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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SHEARN MOODY, JR.,

Petitioner,

v.

THARPE FORRESSTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

SHEARN MOODY, JR.,

Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Does the doctrine of *Donovan v. City of Dallas*, 377 U.S. 408 (1964), forbid a state court with in rem jurisdiction in a civil action from enjoining in personam federal court litigation that might affect the state litigation but that would not require the federal court to act in rem or seek custody or control of the res?

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PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Shearn Moody, Jr., hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in these two consolidated cases.*

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*The caption of the case in this Court contains the names of all parties.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit on appeal (July 3, 1980) and on petition for rehearing *en banc* (December 15, 1980) are reproduced as Appendices A and B respectively. The opinion of the United States District Court for the Southern District of Texas (November 13, 1978) is reproduced as Appendix C. The initial opinion of the Court of Appeals is reported at 620 F.2d 548.

JURISDICTION

The second decision of the Court of Appeals, letting stand its decision of July 3, 1980, affirming the District Court's grant of summary judgment for respondents, was entered on December 15, 1980. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Cl. 2:

This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

First Amendment:

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

Fourteenth Amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Summary

Petitioner seeks review of a decision of the Fifth Circuit affirming a decision of the United States District Court for the Southern District of Texas. The Fifth Circuit accepted the validity of an injunction issued by an Alabama state court, enforcing a state court judgment against petitioner and in favor of two other civil parties: the statutory receiver of an insurance company and another insurance company. The judgment was for nearly a quarter of a million dollars. It was based on petitioner's participation (by providing and paying the fees of counsel for plaintiffs) in an in personam federal court civil rights and constitutional action against the receiver and the other insurance company, among others. The Alabama state court had ruled that petitioner's participation in the federal court action violated an injunction against such litigation that the federal court defendants had obtained from the state court.

1. The Fifth Circuit's decision violates the doctrine of *Donovan v. City of Dallas*, 377 U.S. 408 (1964), its predecessors and its progeny, that forbids state courts from interfering with federal in personam litigation.

2. The Fifth Circuit's decision is contrary to and in conflict with decisions of the Seventh Circuit and district courts in the Fourth and Second Circuits that follow the *Donovan* rule.

3. By accepting the state court injunction and acting as collection agent for this extraordinarily harsh sanction imposed on petitioner for exercising rights guaranteed by the First Amendment, the Fifth Circuit's decision virtually disembowels *Donovan*. It invites state courts wholesale to foreclose federal court inquiry into violations of

federal statutory and constitutional rights in entire classes of cases exempt until now from state court interference.

State Court Proceedings

Petitioner, a Texas resident, is the principal stockholder and former president of the Empire Life Insurance Company of America ("Empire Life"), an Alabama insurance company doing business in interstate commerce. On June 29, 1972, the Circuit Court for Jefferson County, Alabama, placed Empire Life in receivership.[1]

Petitioner moved for leave to intervene in the receivership proceedings on a limited basis. After initially denying the motion, the circuit court permitted petitioner to intervene on January 8, 1974. That same day the receiver asked the court to order that Empire Life be liquidated and its policies reinsured by respondent Protective Life Insurance Co. ("Protective"), a competitor of Empire Life. On June 14, 1974, the court appointed respondent Protective as reinsurer.

Petitioner sought redress in the courts to challenge those actions. On January 6, 1975, at the receiver's instance, the circuit court enjoined petitioner from "filing, financing, sponsoring, initiating, or aiding in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court . . . on behalf of any

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[1]The receiver was the Alabama Commissioner of Insurance. Successor commissioners have succeeded as receivers; there have been at least four during the pendency of this litigation. They will be referred to throughout this petition collectively, as the "receiver." Respondent Foresster was substituted for the receiver named as appellee in the Fifth Circuit's opinions, H. H. Sumrall, pursuant to Fed. R. App. P. Rule 43, prior to the decision denying rehearing *en banc*.

party" against the receiver, the receivership, or with respect to any claim affecting the affairs of Empire Life or the receivership without first obtaining the court's permission. The Alabama Supreme Court affirmed the injunction. *Moody v. State ex rel. Payne,* 329 So.2d 73 (Ala. 1976).

Prior to issuance of the injunction, however, an Empire Life policy-holder, Willie Allmon, a citizen and resident of Arkansas, had filed a lawsuit against the receiver in the federal district court for the Middle District of Alabama. *Allmon v. Bookout,* Civ. No. 74-377-N (M.D. Ala). The suit alleged impairment of the cash value of Allmon's policy. Petitioner had assisted Allmon by providing him with counsel at petitioner's expense. On January 28, 1975, Allmon, through the counsel petitioner provided, filed an amended complaint in the federal court action. The amended complaint framed a class action on behalf of Empire Life policyholders. It alleged that the receivership proceedings were tainted by corruption and by a conspiracy among the officials involved in the case. It claimed that the conspiracy and the proceedings themselves violated the civil rights of the class. It alleged the unconstitutionality of various new Alabama statutes providing for receivership of insurance companies.

The receiver and Protective immediately asked the Jefferson County Circuit Court to adjudge the filing of the amended complaint in *Allmon* a violation of its injunction against petitioner and to hold petitioner in contempt. On April 30, 1975, the Jefferson County court, asserting personal jurisdiction over the absent petitioner on the basis only of his earlier intervention, held him in civil contempt. In June 1976 the court issued an order requiring petitioner to appear and purge himself of the contempt. He did not appear. In August Protective

asked the court to hold petitioner in criminal contempt.[2]

On July 19, 1976, the receiver and on August 19, 1976, respondent Protective filed petitions seeking compensatory and exemplary damages from petitioner for violating the injunction. These petitions were based on a peculiar Alabama procedure, first approved only shortly before in *Lightsey v. Kensington Mortgage & Finance Corp.*, 315 So.2d 431 (Ala. 1975). Under the *Lightsey* procedure private parties may recover damages (called in *Lightsey* a "fine") based on a finding of contempt against the target of an injunction without filing a separate action against the target. Petitioner challenged the Jefferson County court's jurisdiction over him for the damage claims, but the court found jurisdiction based on petitioner's limited participation in the prior receivership proceedings, held petitioner in default when he declined further to participate and entered judgment. As modified on appeal, Protective was awarded $165,228.50 and the Receiver was awarded $68,115.78, in compensatory and punitive damages and for attorney's fees. *Moody v. State ex el. Payne,* 355 So.2d 116 (Ala.), *cert. denied,* 439 U.S. 910 (1978).

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[2]On September 13, 1976, petitioner was tried *in absentia* on the criminal contempt charge and adjudged in criminal contempt. The court sentenced petitioner to 20 days in jail and fines totalling $200. *See* State ex rel. Payne v. Empire Life Insurance Co. of America, 351 So.2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978). Never having subjected himself to the jurisdiction of the Alabama courts except on a limited basis in the receivership proceedings, petitioner has neither served the jail sentence nor paid the fine.

Federal Court Proceedings Below

On April 21, 1978, respondents filed a civil action in the District Court for the Southern District of Texas to enforce the Alabama money judgments. Jurisdiction was founded on diversity of citizenship, 28 U.S.C. §1332. Petitioner appeared in the district court and argued, *inter alia*, that the Alabama courts had no jurisdiction to issue the injunction and subsequent damage judgments and that the injunction itself was invalid under the principles of *Donovan v. City of Dallas* and *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939). The district court denied these claims in a cursory, two paragraph opinion. It ruled, without discussion, that the Alabama injunction did not violate *Donovan*. The Fifth Circuit affirmed.

It was obvious that the *Allmon* complaint did not ask the federal court to assert in rem control or custody over the res, Empire Life Insurance Co. Thus on its face the Jefferson County court's injunction was invalid. It violated the well established rule of *Donovan* and *Princess Lida* that even a court that has already acquired in rem jurisdiction of a res may not lawfully bar other in personam actions, but may only prevent other actions in rem that seek possession of the property. All the Fifth Circuit could say was that *Allmon* "would interfere with and would have impeded if not thwarted" the receivership. (App. A, 4a) *Allmon* sought the purely in personam relief of a declaration of the unconstitutionality of new and untested Alabama insurance company receivership statutes; injunction against their further application by the receiver as against the *Allmon* class, and damages. This, the Fifth Circuit said, put the *Allmon* plaintiffs "in hostile competition with the Receiver" for Empire's assets. Even though the *Allmon* suit did not ask

the federal court to assume jurisdiction (custody) over the res, the Fifth Circuit held that the *Donovan-Princess Lida* exception for two in rem actions applied. (App. B, 7a)

REASONS FOR GRANTING THE WRIT

1.

Donovan holds that "state courts are completely without power to restrain federal court proceedings in *in personam* actions," 377 U.S. at 413. The Fifth Circuit's decision creates an exception to that rule that swallows the rule itself.

Under *Donovan*, a federal plaintiff may not be deprived of the right to litigate in a separate *in personam* action his interests in property over which a state court has taken in rem jurisdiction.[3] Until now states have been powerless to preclude concurrent jurisdiction in such situations, whether by court injunction or by statutory provisions purporting to forbid federal litigation.[4] And

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[3] *See, e.g.*, Markham v. Allen, 326 U.S. 490 (1946); Fischer v. American United Life Insurance Co., 314 U.S. 549 (1942); Pufahl v. Park , Estate, 299 U.S. 217, 226 (1936); Commonwealth Trust Co. of Pittsburth v. Bradford, 297 U.S. 613, 618-19 (1929); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909); *cf.* Morris v. Jones, 329 U.S. 545, 550-52 (1947) (state court sitting in rem must recognize valid out of state judgment against receiver).

[4] *See, e.g.*, Monogram Industries, Inc. v. Zellen, 467 F. Supp. 122, 123 (D. Mass. 1979) (state statute conferring exclusive jurisdiction upon state probate court cannot preclude federal diversity claim against estate in probate); Mills v. Roanoke Ind. Loan & Thrift, 70 F.R.D. 448, 451 (W.D. Va. 1975) (state injunction forbidding suits against company in state receivership ineffective to stop federal court action); Slotkin v. Brookdale Hospital Center, 357 F. Supp. 705, 707-708 (S.D.N.Y. 1972) (two

[footnote continued]

the federal courts have not been loath to exercise their judicial power and fulfill their responsibilities as courts in a myriad of such situations.[5]

There is a single, limited qualification to the *Donovan* rule: a state court that has acquired custody over property may enjoin federal litigation that would require the federal court's officers (e.g., the United States Marshals) to take physical custody and control of the same property. 377 U.S. at 412. The exception had been stated in *Princess Lida of Thurn and Taxis v. Thompson*, which the *Donovan* Court cited:

> . . . it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the *two suits* are in rem, or quasi in rem, so that the court,

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actions may proceed simultaneously where one is in rem and the other is in personam, despite existence of injunction forbidding second suit); Weisfeld v. Spartans Industries, Inc., 58 F.R.D. 570, 577 (S.D.N.Y. 1972) (state court may not enjoin federal suit to enjoin corporate reorganization in state court).

[5] *See, e.g.*, Dragstrem v. Obermeyer, 549 F.2d 20, 27 (7th Cir. 1977); Akin v. La. National Bank of Baton Rouge, 322 F.2d 749 (5th Cir. 1963) (heir may seek declaratory judgment as to right in will probated in state court); Koller v. Richmond Industrial Loan & Thrift, 407 F. Supp. 1211, 1212 (E.D. Va. 1975) (federal plaintiff may proceed in securities fraud action against insolvent company, its employees, and the receiver so long as judgment "does not conflict with [state] court's authority to decide questions relating to control of [the] property"); Joiner v. City of Dallas, 380 F. Supp. 754, 762 (N.D. Tex. 1974), *aff'd*, 419 U.S. 1042, *reh. denied*, 419 U.S. 1132 (1975) (federal plaintiff may challenge constitutionality of state eminent domain proceedings when only state determination remaining to be made is of amount to be paid for land).

> *or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause* and grant the relief sought the jurisdiction of the one court must yield to that of the other. (Emphasis added; footnote omitted).

General Atomic Co. v. Felter, 434 U.S. 12 (1977), made clear that the jurisdiction for this narrow qualification was no more than to prevent the situation of an unseemly tug-of-war between two courts seeking to assert physical control over the same res; *see Markham v. Allen*, 326 U.S. 490, 494 (1946). Injunctions may not issue even to forestall "vexatious and harassing litigation," *id.* at 16, much less merely to prevent federal courts from exercising concurrent subject matter jurisdiction or to prevent federal courts from adjudicating legal issues also involved in state proceedings. As the Court stated in *General Atomic*, the federal courts are "fully capable of preventing their [own] misuse for harassment." 434 U.S. at 19.

As if to drive the point home, on remand in *General Atomic* the lower court excluded from its injunction "all *in personam* actions in Federal Courts . . ." *General Atomic Co. v. Felter*, 436 U.S. 493 (1978).[6]

Here the federal court litigation in which petitioner participated was unquestionably in personam. *Allmon* sought relief against individual state officials in their

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[6]In the second *General Atomic* opinion the Court held that a writ of mandamus would issue to prevent the lower court from trying to extend its injunction to forbid arbitration proceedings under Federal law. General Atomic Co. v. Felter, 436 U.S. 493 (1978).

official capacity, claiming that they were acting unconstitutionally to deprive the plaintiff of civil rights personal to plaintiff. The federal court was not asked to assume for itself the physical control of the res, Empire Life, which the Jefferson County court had taken and then delegated to the Receiver; *cf. Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). Furthermore, since *Allmon* was already pending when the Jefferson County court issued its injunction, that court's judgment against petitioner effectively enjoined continuation of a federal action already proceeding. The *Donovan* rule is, if anything, more strongly applicable in such a situation. *See General Atomic Co. v. Felter*, 434 U.S. at 17: "rights conferred by Congress to bring *in personam* actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective."

The Fifth Circuit ignored *Donovan, Princess Lida, General Atomic* and the entire body of precedent (nn. 2, 3, 4 *supra*) confirming and implementing the rule of those decisions. It held that Alabama's Jefferson County court could properly enjoin and assess damages of a quarter million dollars against petitioner for violating an invalid injunction that purported to forbid petitioner from assisting federal court civil rights litigation, even though the federal court litigation did not seek federal court custody of the res. Its radical and clearly erroneous departure from the rule repeatedly announced and explained by this Court, if permitted to stand, will spawn confusion among the lower federal courts as to the vitality of the *Donovan* principles and will leave the state of the law in disarray. For that reason alone it demands review by this Court.

2.

The decision below creates a clear conflict in the application of the *Donovan* principles between the Fifth Circuit on the one hand and the Seventh Circuit, Fourth Circuit and Second Circuit on the other.

A.

The Seventh Circuit decision is *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979). There, as here, a state court had placed an insurance company in receivership. There, as here, the (Missouri) state court issued an injunction restraining all persons "from prosecuting or bringing any action, . . . against the [insurance company] . . . or its properties or assets, except pursuant to the order of this court." Like petitioner here, plaintiffs there then filed an amended complaint in a pending federal action against the insurance company. Plaintiffs there alleged (pursuant to the Employee Retirement Income Security Act of 1974) that the insurance company had participated in a conspiracy to defraud the pension fund of its assets.

Unlike the district court and Fifth Circuit here, however, the Seventh Circuit in *Central States* refused to recognize and enforce the Missouri state court's injunction:

> Old Security contends that, although technically in personam, this federal action has substantial in rem aspects.
>
> If this federal action was in rem, it would present a very different situation. *Blackhawk Heating & Plumbing Co., Inc. v. Geeslin*, 530 F.2d 154 (7th Cir. 1976) involved state and federal proceedings, both in rem. . . .

> [T]he Fund's second amended complaint seeks to enforce a personal liability and obtain a money judgment, not to obtain possession of a res. Old Security describes injunction motions by the Fund as demanding in rem relief. Nothing of record indicates that the district court granted those months or any in rem relief. The district court is fully capable of preventing inappropriate conversion of the suit to a proceeding truly in rem.

600 F.2d at 675 n. 7.[7]

Central States could not conflict more squarely with this case. Here, contrary to the Seventh Circuit's holding, the Fifth Circuit held a state court injunction valid to prevent a federal in personam action even though it sought to enforce only "personal liability" and did not seek "to obtain possession of a res."

B.

While the question does not appear to have reached the Courts of Appeals for the Fourth and Second Circuits, decisions of district courts in those circuits are in square conflict with the Fifth Circuit here.

In *Mills v. Roanoke Ind. Loan & Thrift*, 70 F.R.D. 448, 451 (W.D. Va. 1975), a Virginia state court had

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[7]The Seventh Circuit was affirming the district court there, which had held (in a passage the Seventh Circuit quoted, 600 F.2d at 674), that *Blackhawk Heating & Plumbing* was a situation where

> the Federal court should not simultaneously proceed with liquidation of the *res*, particularly when a domestic insurance company is involved. *However, when the Federal suit is proceeding in personam, we see no reason why we should not proceed simultaneously with the State court liquidation proceedings.* (emphasis added)

District courts in the Seventh Circuit of course follow *Central States. See, e.g.*, Tcherepnin v. Franz, 475 F. Supp. 92, 95-96 (N.D. Ill. 1979).

issued an injunction restraining "all persons from prosecuting suits" against a company in state receivership "without first obtaining permission of the court." Plaintiffs filed suit in federal court against former employees of the company, the company itself, and the receivers for a violation of the federal securities laws. Defendants asked the court to dismiss the case or abstain on the basis of the injunction. The District Court for the Eastern District of Virginia refused:

> . . . where one suit is *in rem*, as is the receivership proceeding in state court, and the other suit is *in personam*, it is equally well established that each court may exercise its concurrent jurisdiction independently of the other. . . . Under such circumstances, *the state court could not enjoin plaintiffs from asserting their federal causes of action.*

(citations omitted; emphasis added)

In *Slotkin v. Brookdale Hospital Center*, 357 F . Supp. 705, 707 (S.D.N.Y. 1972), a News York state court enjoined all actions against an insurance company in liquidation. Plaintiffs filed a federal diversity action based on fraud committed by the company and its former employees. Upon the liquidator's motion to dismiss the case because of the injunction, the district court held:

> This injunction would require our dismissal of the instant proceeding only if the state court requires exclusive jurisdiction to protect the *res*—the corporate assets. Thus, if two suits are *in rem* or *quasi in rem*, the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other in order "to avoid unseemly and disastrous conflicts in the administrating of dual judicial system . . ." *But two actions may proceed simultaneously where one is in rem and the other is in personam.*

(citation omitted; emphasis added)

C.

These three cases are in direct conflict with the Fifth Circuit's decision here. In each, a state court, proceeding in rem, had issued an injunction virtually identical to that of the Alabama court. The plaintiffs in the Seventh, Fourth and Second Circuits, like petitioner here in the Fifth Circuit, participated in federal court litigation which affected the state in rem proceedings and which violated the state court injunctions. The Seventh Circuit in *Central States*, a Fourth Circuit district court in *Mills* and a Second Circuit district court in *Slotkin* held the injunctions invalid; but the Fifth Circuit here upheld the injunction and approved enforcement of a quarter of a million dollar judgment against petitioner for violating it. This clear conflict within four federal circuits on an important issue can be resolved only by this Court's review.

3.

Petitioner is not a late-comer in seeking the Court's enforcement of the *Donovan* rule. Petitioner thrice sought certiorari to review the Alabama courts' injunction against in personam litigation in disregard of *Donovan*.[8]

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[8]State ex rel. Payne v. Empire Life Ins. Co. of America (*Ex parte* Shearn Moody) 351 So.2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978) (No. 77-1041, October Term 1977); Moody v. State ex rel. Payne, 351 So.2d 552 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978) (No. 77-1109, October Term 1977); Moody v. State ex rel. Payne, 355 So.2d 1116 (Ala. 1978), *cert. denied*, 439 U.S. 910 (1978) (No. 78-110, October Term 1978). The Fifth Circuit was explicit in its bias against petitioner because of his insistence on exercising his right to resort to the courts to protect his property interests, App. A, 4a-5a – a right protected by the First Amendment. *See In Re* Primus, 436 U.S. 412 (1978). Such bias of course does not justify the Fifth Circuit's impatient rush to be rid of petitioner without a reasoned explanation of its departure from Donovan.

The Fifth Circuit's willingness to enforce the invalid Alabama injunction takes this case out of the category of parochial, anomalous decisions of one of 51 state court systems. It means that the unequivocal *Donovan* rule that "state courts are completely without power to restrain federal court proceedings in *in personam* actions," is no longer the law in the largest federal judicial circuit. It means that state courts need no longer heed this Court's admonition in *General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977), that "*Donovan* presented as compelling a case as there could be for permitting a state court to enjoin the further prosecution of vexatious federal proceedings. . . . We nevertheless overturned the state-court injunction."

The Fifth Circuit's decision means that state courts anew may hope to encroach on federal courts' independence and supremacy in deciding their own jurisdiction in cases properly before them,[9] as state courts had attempted—and were stopped by this Court—a century ago.[10]

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[9] *See* United States v. United Mine Workers of America, 330 U.S. 258, 290-292 (1947).

[10] *See, e.g.*, Railway Co. v. Whitton's Administrator, 80 U.S. (13 Wall.) 270 (1871); Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868); *see also* Terral v. Burke Construction Co., 257 U.S. 529 (1922).

CONCLUSION

This Court's review of the decision below is a necessity, to reaffirm the independence of the federal courts from state court interference; to ensure the lower federal courts' adherence to the principles of *Donovan*; to correct the Fifth Circuit's departure from those principles in conflict with other Circuits' strict adherence to them, and to prevent a federal court from unjustly lending its aid as a collection agency for the enforcement of an invalid decree in violation of a citizen's privilege to resort to the federal courts to redress violations of federally guaranteed rights.

Respectfully submitted,

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APPENDIX

APPENDIX A

H. H. SUMRALL, Jr., Commissioner of Insurance of the State of Alabama, as Receiver for Empire Life Insurance Company of America, Plaintiff-Appellee,

v.

Shearn MOODY, Jr.,
Defendant-Appellant.

PROTECTIVE LIFE INSURANCE COMPANY,
a corporation, Plaintiff-Appellee,

v.

Shearn MOODY, Jr.,
Defendant-Appellant.

No. 79-1034.

United States Court of Appeals,
Fifth Circuit.

July 3, 1980.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, HENDERSON and SAM D. JOHNSON, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Shearn Moody appeals from final judgments entered in favor of Protective Life Insurance Company and the Receiver of Empire Life Insurance Company of America. The actions were brought by Protective and the Empire Receiver in federal district court to enforce Alabama damage judgments rendered against Moody. 28 U.S.C.A. §1738. We affirm.

Empire was placed in receivership by an Alabama state court. Moody intervened and was subsequently perma-

nently enjoined from any legal interference relating to the receivership proceeding. *State ex rel. Bookout v. Empire Life Ins. Co.*, No. 171 687 (Ala.Cir.Ct. Jan. 6, 1975). When Moody participated in the filing of an amended complaint in *Allmon v. Bookout*, No. 74-377N (M.D.Ala. Nov. 28, 1974) (amended complaint filed), *decided*, (M.D.Ala. April 24, 1975), *cuase vacated, dismissed, and remanded*, No. 75-2104 (5th Cir. Nov. 18, 1975), *cause dismissed*, (M.D.Ala. June 28, 1976), the Alabama state court, after an evidentiary hearing, held Moody in contempt. *State ex rel. Bookout v. Empire Life Ins. Co.*, No. 171-687 (Ala.Cir.Ct. April 30, 1975). Over Moody's vigorous challenges on the grounds of lack of personal service, *in personam* jurisdiction, subject matter jurisdiction, and a proper basis for damage assessment in a "civil action," the Alabama court awarded damages in favor of appellees, *State ex rel. Bookout v. Empire Life Ins. Co.*, No. 171-6878 (Ala.Cir.Ct. Oct. 19, 1976, Nov. 16, 1976), which were substantially affirmed on appeal. *Moody v. State ex rel. Payne*, 355 So.2d 1116, (Ala. 1978), *cert. denied, Moody v. Alabama ex rel. Payne*, 439 U.S. 910, 99 S.Ct. 279, 58 L.Ed.2d 256 (1978).

Protective and the Empire Receiver then filed diversity actions in federal district court to enforce the damage awards. 28 U.S.C.A. §1738. The District Court, again over Moody's caustic attack, granted the motions for summary judgment against him, enforcing the Alabama judgment awards. *Payne v. Moody*, No. G-78-69 (S.D.Tex. Nov. 15, 1978); *Protective Life Insurance v. Moody*, No. G-78-70 (S.D.Tex. Nov. 15, 1978).

Moody appeals, protesting several errors: the judgments (1) were rendered without adequate notice to Moody so violated due process, (2) denied his right to seek relief in federal courts in violation of the federal supremacy clause, (3) violated due process since the

contempt damage claims were not filed until after contempt liability was determined, (4) were penal in nature so not entitled to full faith and credit, (5) were not civil actions properly within the diversity jurisdiction of a federal district court so not entitled to full faith and credit, and (6) violated his Fifth Amendment privilege against self-incrimination since criminal contempt proceedings were pending against him. None of these claims withstands analysis.

Moody's due process claim of notice and jurisdiction over his person is easily discarded. The Supreme Court of Alabama in *Lightsey v. Kensington Mortgage & Finance Corp.*, 294 Ala. 281, 315 So.2d 431 (1975), made clear that at a violation of a valid restraining order contempt damages may be rendered in an action ancillary to—but still very much part of—the main proceeding. Here, the main proceeding, replete with sufficient proof of *in personam* jurisdiction over Moody, is the receivership proceeding. Moody may have been cagey in his initial participation—or lack of participation—at one or more of the contempt citations. Yet the evidence is abundant that Moody was informed of the contempt action constituting a part of the main receivership case in which he voluntarily entered the fray and became an inexhaustible combatant. The Alabama courts so held and we agree.

Moody also contests the denial of his right to seek relief in the federal courts. He claims this violates *Donovan v. Dallas,* 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964), *followed in General Atomic Co. v. Felter,* 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977), *and Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). In *Donovan*, the Court refused to permit a state court to punish a federal court litigant for pursuing his remedies in an *in personam* action. However,

the Court specifically recognized the traditional exception to this rule for proceedings *in rem* or *quasi in rem*. The Court explained that for proceedings *in rem* or *quasi in rem* the state or federal court has custody of the jurisdiction-related property and retains exclusive jurisdiction over it. *Donovan v. Dallas*, 377 U.S. at 412, 84 S.Ct. at 1582, 12 L.Ed.2d at 413. Neither *General Atomic Co. v. Felter, supra,* nor *Hanson v. Denckla, supra,* is to the contrary. In this case, the state court restrained Moody from, and assessed damages for, his action which did and would interfere with the receivership proceeding. It cannot be disputed that a receivership action is one *in rem* or *quasi in rem*. The *Allmon* case had it succeeded, and would have impeded, if not thwarted, the entire receivership proceeding. Moody's conduct in the *Allmon* case attacked the very validity of the receivership, jurisdiction over which, under *Donovan*, rested safely and exclusively in the Alabama state courts.

Finally, particularly with regard to his remaining contentions, Moody is no stranger to the Courts. Judges have heard and considered his arguments over and again. Lawsuits which he has instigated have resulted in at least thirteen reported appellate opinions[1] and seven petitions

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[1] *Moody v. State ex rel. Payne*, 355 So.2d 1116 (Ala. 1978); *Moody v. State ex rel. Payne*, 351 So.2d 552 (Ala. 1977); *Moody v. State ex rel. Payne*, 351 So.2d 547 (Ala. 1977); *Ex parte Moody*, 351 So.2d 538 (Ala. 1977); *Moody v. State ex rel. Payne*, 344 So.2d 160 (1977); *Moody v. State ex rel. Payne*, 295 Ala. 299, 329 So.2d 73 (1976); *Moody v. Texas*, 538 S.W.2d 158 (Tex.Civ.App. 1976, writ ref'd n. r. e. 1977); *Moody v. Moody Nat'l Bank*, 522 S.W.2d 710 (Tex.Civ.App. 1975, n. r. e.); *Moody v. Crook*, 520 S.W.2d 958 (Tex.Civ.App. 1975); *Moody v. State*, 520 S.W.2d 452 (Tex.Civ.App. 1975); *Moody v. Jones*, 519 S.W.2d 536 (Tex.Civ. App. 1975); *Empire Life Ins. Co. v. State*, 492 S.W.2d 366 (Tex.Civ.App. 1973); *Day v. State*, 489 S.W.2d 368 (Tex.Civ.App. 1972, n. r. e.).

for certiorari.[2] Indeed, by our computations, Moody's "case law" has been rendered and reviewed by no less than thirty-two members of the judiciary, not counting all nine Supreme Court Justices on petitions for both certiorari and rehearing. Here, we need only add our agreement with the Courts before us. Moody's protests before this Court, like their predecessors, are totally without merit.

AFFIRMED.

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[2] *Ex parte Shearn Moody, cert. denied,* 434 U.S. 835, 98 S.Ct. 124, 54 L.Ed.2d 97, *rehearing denied,* 434 U.S. 976, 98 S.Ct. 537, 54 L.Ed.2d 469 (1977); *Moody v. Texas,* 539 S.W.2d 354 (Tex. Civ.App. 1976), *cert. denied,* 434 U.S. 985, 98 S.Ct. 612, 54 L.Ed.2d 479 (1977) *rehearing denied,* 434 U.S. 1042, 98 S.Ct. 786, 54 L.Ed.2d 793 (1978); *Moody v. Payne, cert. denied,* 434 U.S. 996, 98 S.Ct. 634, 54 L.Ed.2d 490 (1977), *rehearing denied,* 434 U.S. 1089, 98 S.Ct. 1288, 55 L.Ed.2d 796 (1978); *Moody v. Texas,* 538 S.W.2d 158 (Tex.Civ.App. 1976), *cert. denied,* 434 U.S. 1068, 98 S.Ct. 1248, 55 L.Ed.2d 770 (1978); *Moody v. Alabama ex rel. Payne,* 351 So.2d 552 (Ala. 1977), *cert. denied,* 435 U.S. 969, 96 S.Ct. 1609, 56 L.Ed.2d 60 (1978); *Ex parte Shearn Moody,* 351 So.2d 538 (Ala. 1977), *cert. denied,* 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed.2d 60 (1978); *Moody v. Alabama ex rel. Payne,* 355 So.2d 1116 (Ala.), *cert. denied,* 439 U.S. 910, 99 S.Ct. 279, 58 L.Ed.2d 256 (1978).

APPENDIX B

H. H. SUMRALL, Jr., etc.,
Plaintiff-Appellee,

v.

Shearn MOODY, Jr.,
Defendant-Appellant.

PROTECTIVE LIFE INSURANCE COMPANY,
a corporation, Plaintiff-Appellee,

v.

Shearn MOODY, Jr.,
Defendant-Appellant.

No. 79-1034.

United States Court of Appeals,
Fifth Circuit.

Dec. 15, 1980.

Appeal from the United States District Court for the Southern District of Texas; Finis E. Cowan, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 3, 1980, 5 Cir., 620 F.2d 548)

Before BROWN, HENDERSON and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

On petition for Rehearing and Rehearing En Banc Moody asserts that our opinion "has expanded the *Donovan* [*v. Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409] exception to any case which affects a pending in rem proceeding rather than confining it to cases where the second action seeks jurisdiction or control over the same property or res. The authorities on

which the in rem exception are based limit its applicability to cases where two courts are competing for possession or control of the same property or res. See *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939); *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 (1935)."

Accepting this abbreviated statement we are convinced that the Federal Court *Allmon* suit did just that.

In that case the holder of an Empire Special Executive Plan insurance policy, sued Bookout,[1] individually and as Commissioner of Insurance for the state of Alabama, and as Receiver of Empire Life Insurance Company of America and also the Alabama Circuit Judge, the Special Assistant to the Judge, Protective Life Insurance Co. and five individuals.

In four counts covering the Sixty-seven paragraphs the pleading complained of fraud and illegal, unconstitutional action by the defendants in bringing about the receivership of Empire, the appointment of Bookout as Receiver and the subsequent liquidation of Empire by a reinsurrance agreement with Protective. The complaint also attacked the constitutionality of §§623, 631 and 634, Title 28A, Alabama Code, providing for a receivership and appointment of the Commissioner as Receiver as well as §748, Title 28A, Alabama Code.

But it was the prayer for relief which indelibly marked the real nature and purpose of the action.

Brought as it was against the appointed Receiver it requested the Court to declare unconstitutional §§623

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[1]Succeeded by H. H. Sumrall now substituted by Tharpe Foresster, F.R.App.P. 43, as the current Commissioner and Receiver of Emoire.

at 631, Title 28A, Alabama Code on the basis of which the receivership was sought and the Receiver appointed. A declaration or injunction would have destroyed the receivership, and obviously, the Receiver's possession and control of all assets of Empire. The prayer sought injunction against the Receiver, the Circuit Judge (and others) enforcing, executing, administering or giving effect to §§623, 631.

The prayer also sought injunction restraining the Receiver (and others) from liquidating Empire, enforcing the reinsurance treaty with Protective, and as a climax, restraining the enforcement or carrying out of any order or judgment in case No. 171-687, *Alabama ex rel. Bookout v. Empire.* Heeding such injunction, if granted as sought, the receivership would have been terminated, and possession of all assets of Empire would have been taken away from the Receiver.

Added, as a clincher, the prayer expressly, in the *alternative* to such sweeping injunction order, sought money damages. Tested as it must be, by the nature and kind of relief which would be granted (or grantable) if the plaintiff were successful this suit was in hostile competition with the Receiver to wrest control and possession of Empire's assets and the Alabama orderly administration of the receivership out of the hands of the Receiver and Alabama Receivership Court.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Filed Nov. 14, 1978

PROTECTIVE LIFE INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

SHEARN MOODY, JR.,

Defendant

CIVIL ACTION NO. G-78-70

CHARLES H. PAYNE, Commissioner of Insurance of the State of Alabama, as Receiver for Empire Life Insurance Company of America,

Plaintiff,

vs.

SHEARN MOODY, JR.,

Defendant

CIVIL ACTION NO. G-78-69

MEMORANDUM GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

The court's review of the pleadings and briefs persuades this court that the Alabama courts rendering the judgments upon which the above suits are predicated had jurisdiction of both the parties and the subject matter. The court is also persuaded that the Alabama State Court judgments do not violate the principles of *Donovan vs.*

City of Dallas, 377 U.S. 408 (1964) for the reason stated by the Supreme Court of Alabama in *Moody vs. State*, 329 So.2d 73, 81 (Alabama 1976).

If the conclusions of the foregoing paragraph are correct, this Court is obligated to give full faith to the Alabama judgments, 28 U.S.C., §1738, Art. 4, §1, U.S.C.A. Constitution.

Plaintiffs' motions for summary judgment will be granted. Counsel for the plaintiffs will prepare and submit appropriate orders.

Signed this 13th day of November, 1978.

/s/ Finis E. Cowan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Filed Nov. 15, 1978

PROTECTIVE LIFE INSURANCE COMPANY, a corporation,

Plaintiff,

VS.

SHEARN MOODY, JR.,

Defendant.

CIVIL ACTION NO. G-78-70

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered by the Court herein on November 14, 1978, the Motion for Summary Judgment filed by Plaintiff, Protective Life Insurance Company, is due to be and is hereby granted. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiff, Protective Life Insurance Company, a corporation, have and recover of Defendant, Shearn Moody, Jr., the sum of $184,838.33, being the principal amount of $165,228.50 together with interest in the amount of $19,609.83 (computed at the rate of six percent (6%) per annum from November 16, 1976, to November 8, 1978).

It is further ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of Defendant, Shearn Moody, Jr., be and the same is hereby denied, and that the Defendant, Shearn Moody, Jr., take nothing with respect to this case. Costs to be taxed against Defendant.

DONE, THIS 14th DAY OF NOVEMBER, 1978.

/s/ Finas E. Cowan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Filed Nov. 15, 1978

CHARLES H. PAYNE, Commissioner of Insurance of the State of Alabama, as Receiver for Empire Life Insurance Company of America,

Plaintiff,

VS.

SHEARN BOODY, JR.,

Defendant.

CIVIL ACTION NO. G-78-69

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered by the Court herein on November 14, 1978, the Motion for Summary Judgment filed by Plaintiff, Charles H. Payne, is due to be and hereby granted. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiff, Charles H. Payne, Commissioner of Insurance and Receiver for Empire Life Insurance Company, have and recover of Defendant, Shearn Moody, Jr., the sum of $76,010.73, being the principal amount of $68,115.78 together with interest in the amount of $7,894.95 (computed at the rate of six percent (6%) per annum from December 3, 1976, to November 8, 1978).

It is further ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of Defendant, Shearn Moody, Jr., is due to be and is hereby denied, and that Defendant, Shearn Moody, Jr., take nothing with respect to this case. Costs to be taxed against Defendant.

DONE, THIS 14th DAY OF NOVEMBER, 1978.

/s/ Finas E. Cowan
United States District Judge

No. 80-1235

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHEARN MOODY, JR.,
Petitioner,

v.

THARPE FORRESTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,
Respondent,

SHEARN MOODY, JR.,
Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,
Respondent.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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No. 80-1235

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHEARN MOODY, JR.,
Petitioner,

v.

THARPE FORRESTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,
Respondent,

SHEARN MOODY, JR.,
Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,
Respondent.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

INTRODUCTION

This joint brief in opposition is filed on behalf of Respondents, Protective Life Insurance Company ("Protective"), and Tharpe Forrester, Commissioner of Insurance of the State of Alabama, as Receiver of Empire Life Insurance Company of America ("Empire Receiver").

Petitioner, Shearn Moody, Jr. ("Moody"), was the chief executive officer and principal stockholder of Empire, an insolvent Alabama insurance company that reinsured Empire's policies during the course of receivership proceedings instituted

in 1972, pursuant to the *Alabama Insurance Code,* by the Commissioner of Insurance of the State of Alabama in the Circuit Court of Jefferson County, Alabama, a state court of general jurisdiction ("Alabama Receivership Court").

The instant petition is the most recent in a series of attempts by Moody to secure piecemeal review in this Court of the receivership proceedings conducted by the Alabama Receivership Court. This Court has to date denied seven of Moody's petitions for certiorari relating to the Empire receivership proceedings.[1]

The instant petition seeks review of the decision of the Fifth Circuit Court of Appeals in the consolidated cases of *Sumrall* v. *Moody* and *Protective Life Ins. Co.* v. *Moody,* 620 F.2d 548 (5th Cir. Dec. 15, 1980), *reh. denied,* ____ F. 2d ____ (5th Cir. Dec. 15, 1980), which enanimously affirmed certain judgments entered by the United States District Court for the Southern District of Texas on November 13, 1978 (Pet., App. C). The federal district court judgments in favor of respondents gave full faith and credit to money judgments entered against Moody by the Alabama Receivership Court. Prior to entry of the federal district court judgments below, the money judgments against Moody had been affirmed by the Alabama Supreme Court on Moody's direct appeal. 355 So. 2d 1116 (S. Ct. Ala.), *cert. denied,* 439 U.S. 910, 58 L. ed 2d 256 (1978).

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[1]Petitions have been denied in *Ex parte Shearn Moody, Jr.,* No. 76-1845, *cert. denied* 10/3/77, *reh. denied* 11/28/77; *Shearn Moody, Jr.,* v. *Texas,* No. 77-571, *cert. denied* 12/5/77, *reh. denied* 1/16/78; *Shearn Moody, Jr.* v. *State of Alabama, ex rel. Payne,* No. 77-428, *cert. denied* 12/12/77; *Shearn Moody, Jr. et al.* v. *Texas,* No. 77-873, *cert denied* 2/21/78; *Shearn Moody, Jr.* v. *State of Alabama ex rel. Payne,* No. 77-1109, *cert denied* 4/17/78; *Ex Parte Shearn Moody, Jr.,* No. 77-1041, *cert denied* 4/17/78; *Shearn Moody, Jr.* v. *State of Alabama ex rel. Payne,* No. 78-110, *cert. denied,* 10/16/78.

The money judgments were entered by the Alabama Receivership Court in the wake of a civil-contempt adjudication against Moody on April 30, 1975. No ordinary appellate review in the Supreme Court of Alabama was sought by Moody from the civil-contempt adjudication, and this Court denied Moody's petition for certiorari challenging the contempt adjudication in Case No. 76-1845.[2] The civil-contempt adjudication, in turn, was based on Moody's violation of an injunction entered by the Alabama Receivership Court on January 6, 1975. Moody appealed the injunction to the Supreme Court of Alabama, *Moody* v. *State ex rel. Payne,* 295 Ala. 299, 329 So. 2d 73 (1976). The Alabama Supreme Court unanimously affirmed the injunction, holding that "[t]he injunction [against Moody] was not only justified but was necessary to preserve the assets of Empire." 295 Ala. at 306, 329 So. 2d at 79. Moody sought no timely appellate review in this Court of the decision of the Alabama Supreme Court affirming the January 6, 1975 injunction. Moody did, however, unsuccessfully attempt a collateral attack upon the injunction by petition for certiorari filed in this Court in Case No. 77-1041.[3]

The opinions of the Fifth Circuit Court of Appeals which are sought to be reviewed by the instant petition are attached to the petition as Appendix A and B. Citations of some of the other reported decisions in this litigation are listed below:

Moody v. *State ex rel. Payne,* 355 So. 2d 1116 (S. Ct. Ala. 1978);

Moody v. *State ex rel. Payne,* 351 So. 2d 552 (S. Ct. Ala. 1977);

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[2]*Ex parte Shearn Moody, Jr.,* No. 76-1845, *cert. denied* Oct. 3, 1977, *reh. denied* Nov. 28, 1977.

[3]*Ex parte Shearn Moody, Jr.,* No. 77-1041, *cert. denied* Apr. 17, 1978.

Moody v. *State ex rel. Payne,* 351 So. 2d 547 (S. Ct. Ala. 1977);

Ex parte Shearn Moody, Jr., 351 So. 2d 538 (S. Ct. Ala. 1977);

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Moody v. *State, ex rel. Payne,* 295 ala. 299, 329 So. 2d 73 (1976);

Moody v. *State,* 520 S.W.2d 452 (Tex. Civ. App.—Austin 1975);

Empire Life Ins. Co. v. *State,* 492 S.W. 2d 366 (Tex. Civ. App.—Austin 1973);

Moody v. *Crook,* 520 S.W.2d 958 (Tex. Civ. App.—Austin 1975);

Moody v. *Jones,* 519 S.W.2d 536 (Tex. Civ. App.—Austin 1975);

Day v. *State,* 489 S.W.2d 368 (Tex. Civ. App.—Austin 1972, n.r.e.*);

Moody v. *Moody Nat'l Bank,* 522 S.W.2d 710 (Tex. Civ. App.—Houston 1975, n.r.e.);

Moody v. *Texas,* 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e. 1977).

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*Indicates denial of review by the Texas Supreme Court upon a finding of "no reversible error" (n.r.e.).

REASONS WHY THIS COURT SHOULD DENY MOODY'S PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

1. Moody's Petition Inaccurately Presents the Case.

Petitioner has failed to present with accuracy matters that are essential to an adequate understanding of this case. The abstract question that Moody contends this Court ought to review is whether the decision in *Donovan* v. *City of Dallas,* 377 U.S. 408 (1964), forbids the Alabama Receivership Court from enjoining "in personam federal court litigation that might affect the state litigation but that would not require the federal court to act in rem or seek custody or control of the res." [Pet. at *i*]

The injunction to which the petition refers was entered by the Alabama Receivership Court on January 6, 1975. The injunction prohibited Moody from filing any lawsuit or amended complaints against the Empire Receiver or Protective, without first obtaining the receivership court's approval. Simply stated, the injunction prohibited Moody from interfering with the receivership estate and the receivership proceedings. After the injunction had been entered against him, Moody petitioned the Alabama Supreme Court to issue extraordinary writs of mandamus and prohibition declaring the receivership court's injunction invalid. The Alabama Supreme Court denied extraordinary relief (S. Ct. Ala. No. 1125). Moody applied for, and was refused, rehearing (*id.*). Moody then perfected an appeal from the injunction, and the Alabama Supreme Court affirmed. *Moody* v. *state ex rel. Payne,* 295 Ala. 299, 329 So. 2d 73 (1976). No timely review of the affirmance of the injunction by the Alabama Supreme Court was sought in this Court.

During the pendency of Moody's appeal to the Alabama Supreme Court challenging the validity of the receivership court's injunction against him, an amended complaint was filed

by Moody's lawyers in the case of *Allmon* v. *Bookout*[4] The *Allmon* amended complaint sought to nullify every single order of the receivership court from the time that receivership proceedings were instituted against Empire in 1972. Immediately after the amended complaint was filed, the receivership court was petitioned to issue a show-cause order and to enter a civil-contempt adjudication against Moody. After an evidentiary hearing, Moody was adjudicated in civil-contempt by order entered April 30, 1975. In the meanwhile, determination of the amount of damages sustained by Protective and the Empire Receiver as a result of Moody's contempt was postponed.

On August 19, 1976, after the *Allmon* action had been dismissed as moot on the grounds that Allmon had voluntarily surrendered his Empire policy and, at any rate, had not in any way been injured by the receivership proceedings, Protective and the Empire Receiver filed claims in the receivership proceeding for compensatory and exemplary damages against Moody.[5] Thereafter, trials were conducted to determine the amount of damages resulting from Moody's contempt, *i.e.*, Moody's sponsorship of the *Allmon* action in open violation of the January 6, 1975 injunction of the receivership court. At the conclusion of the damage hearing conducted on Protective's

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[4]*Allmon* v. *Bookout, et al.*, No. 74-377-N (M.D. Ala. 1974); No. 75-2104 (5th Cir.) The *Allmon* litigation is described in the Fifth Circuit's opinions challenged by the instant petition. (Pet., App. A & App. B.)

[5]It is authorized under Alabama law to have damages resulting from civil contempt determined in an ancillary proceeding conducted in the case out of which the contempt arose. *Lightsey* v. *Kensington Mortgage and Finance Corp.*, 294 Ala. 281, 315 So. 2d 431 (1975). This procedure was specifically approved by the decision of the Supreme Court of Alabama which affirmed the money judgments enforced by the federal courts below. *Moody* v. *State ex rel. Payne*, 355 So. 2d 1116 (S. Ct. Ala. 1978), *cert denied*, 439 U.S. 910, 58 L. ed 2d 256 (1978).

claim, the receivership court entered extensive findings of fact and conclusions of law and judgment in favor of Protective in the total amount of $176,008. Trial of the Empire Receiver's claim for damages against Moody resulted in a jury verdict and judgment in favor of the Empire Receiver in the amount of $100,000. On Moody's appeal from the damage judgments, the Supreme Court of Alabama reduced the amount of the judgment in favor of Protective to $165,228.50. The judgment in favor of the Empire Receiver was reduced to $68,115.78. The judgments, as corrected, were affirmed and rendered. A petition for a writ of certiorari in this Court ensued. The sole issue presented by that petition was the same as that asserted in the instant petition, *i.e.*, whether the money judgments against Moody were invalid under the case of *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964). On October 16, 1978, this Court denied such review. 439 U.S. 910, 58 L. ed 2d 256.

The foregoing matters are not accurately presented in the instant petition and, together with the extensive record on which the foregoing developments are based, are essential to an adequate understanding of the points requiring consideration. Moreover, the decisions which are challenged by the instant petition are predicated on the full faith and credit mandate incorporated in 28 U.S.C. Section 1738, but such controlling authority is not even addressed by the instant petition. Accordingly, under Rule 21.5 of this Court, the instant petition is due to be denied.

2. **The Federal Courts Below Properly Concluded That The Alabama Judgments Were Entitled To Full Faith And Credit.**

The federal courts below accorded the Alabama damage judgments full faith and credit under 28 U.S.C. §1738.[4] We submit this conclusion was required by the clear, direct mandate of section 1738 and is inescapably correct.

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[4]The full text of section 1738 is set forth in the Appendix to our Brief.

Section 1738 provides in pertinent part that the authenticated records and judicial proceedings of a state court "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such state ...." There is no doubt that the Alabama Receivership Court, a court of general jurisdiction, was fully empowered under Alabama law to enter the money judgments against Moody and possessed subject matter jurisdiction and plenary personal jurisdiction over Moody (R. 203 & 517). Under such circumstances, the Alabama judgments are immune from collateral attack by law and usage in the State of Alabama. *E.G., Constantine* v. *Constantine,* 261 Ala. 40, 42, 72 So. 2d 831 (1954); *see Jordan* v. *Guaranty Pest Control, Inc.,* 292 Ala. 601, 606, 298 So. 2d 244 (1974). The Alabama judgments have withstood direct attacks by Moody on appeal to the Supreme Court of Alabama[7] and on petition for certiorari in the United States Supreme Court.[8]

In this Court, as in the lower federal courts, Moody attempts collateral attack upon the Alabama judgments. Moody's petition ignores the firmly established rule that "in a suit on a judgment of a state court, predicated on proper jurisdiction over the subject matter and person ... the judgment is not subject to collateral attack." *Midessa Television Co., Inc.* v. *Motion Pictures for Television, Inc.,* 290 F. 2d 203, 204 (5th Cir. 1961) ("[I]n a suit on a judgment of a court of one of the states, full faith and credit requires the enforcement of the judgment unless it is shown that the judgment was entered without jurisdiction").

State-court judgments, such as those collaterally attacked by Moody, are entitled to summary enforcement in federal court.

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[7] *Moody* v. *State ex rel. Payne,* 355 So. 2d 1116 (S. Ct. Ala. 1978).

[8] *Shearn Moody, Jr.* v. *Alabama ex rel. Payne,* No. 78-110, *cert. denied,* 439 U.S. 910, 58 L. Ed. 2d 256 (1978); *see* R. at 241-42 & 529-32.

> "28 U.S.C. § 1738 provides that the authenticated acts, records, and judicial proceedings of all state and territorial courts 'shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.' Under the compulsion of this statute federal courts are required to give full effect to the final judgments of state courts, subject only to narrowly circumscribed avenues of collateral attack. Midessa Television Co. v. Motion Pictures for Television, Inc., 5 Cir. 1961, 290 F. 2d 203."

Hazen Research, Inc. v. *Omega Minerals, Inc.*, 497 F. 2d 151, 153 (5th Cir. 1974) (summary calendar). *Accord, Hogan* v. *Morris*, 424 F. 2d 424, 425 (5th Cir. 1970) (summary calendar); *First American Ins. Co.* v. *O'Connor*, 392 F. 2d 588 (5th Cir. 1968); *Government Personnel Mut. Life Ins. Co.* v. *Kaye*, 584 F. 2d 738 (5th Cir. 1978) (summary calendar).

As no jurisdictional claim is or can be made[9] by Moody against enforcement of the Alabama judgments, they are immune from collateral attack, and federal courts are required to give full effect to them. Based on the foregoing authorities and analysis, the petition is due to be denied because the decisions of the federal courts below enforcing the Alabama judgments against Moody are proper in every respect and were required by 28 U.S.C. § 1738.

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[9] Moody actively litigated the jurisdictional issues in the Alabama trial court (R. 118, 119, 127 & 434, 128-30, 432) and was unsuccessful, both in the trial court (R. 168-70 & 482-84) and in the Supreme Court of Alabama (R. 203 & 517). Thus, Moody cannot collaterally attack in this Court or the federal courts below the determination of the jurisdictional issues by the Alabama courts. *Hazen Research, Inc.* v. *Omega Minerals, Inc.*, 497 F. 2d 151. 153 & 154 n.2 (5th Cir. 1974), *citing Durfee* v. *Duke*, 375 U.S. 106 (1963); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931).

3. The Circuit Court Below Correctly Decided The Question Presented By The Instant Petition.

The Fifth Circuit Court of Appeals correctly decided the issue Moody seeks to have reviewed. The Fifth Circuit, like the federal district court below and the Alabama Supreme Court before it, concluded that the damage judgments against Moody were based on his violation of an injunction entered by the Alabama Receivership Court which prohibited Moody from interfering with the receivership proceeding. *See* App. A, at 3a-9a; App. B at 6a-8a; App. C at 9a-10a; *Moody* v. *State,* 329 So. 2d 73 (S. Ct. Ala. 1976).

The instant petition glibly overlooks that Moody flagrantly violated the injunction and that Moody's raw violation of the injunction sought destruction of the receivership proceedings, including a federal-court injunction restraining enforcement or carrying out of any order or judgment entered by the Alabama Receivership Court.

It appears on the face of the receivership-court injunction that Moody was restrained from participating in the filing of the *Allmon* amended complaint "unless . . . Shearn Moody, Jr., . . . shall first receive the prior approval of this Court." It is undisputed that Moody never sought approval from the receivership court prior to the filing of the *Allmon* amended complaint, and he never sought to have the injunction dissolved or modified. Rather, Moody appealed the injunction to the Supreme Court of Alabama in 1975. There, he made exactly the argument he now urges this Court to adopt, namely that the injunction violates the rule of *Donovan* v. *City of Dallas, supra.* In its decision reported in February 1976, the Supreme Court of Alabama rejected Moody's argument:

> "Most of [Moody's] brief and most of his oral argument were devoted to the proposition stated in *Donovan* v. *City of Dallas,* 377 U.S. 408, 84 S. Ct. 1579, 12 L. Ed. 2d 409 (1964), that 'state courts are completely without power to

restrain federal-court proceedings in the personam actions.' This principle is not new to us. *Donovan* was cited and applied by this court in *Johnson* v. *Brown-Service Ins. Co.*, 293 Ala. 549, 307 So. 2d 518 (1974).

. . .

"Moody made this argument in trying to show that the filing of the case of *Allmon* v. *Bookout* was not in violation of the injunction issued by [the receivership court].

"It is interesting to note that the same paragraph in which the previous quote [from *Donovan*] appears begins with some careful writing and limitation by Justice Black, the author of the opinion:

> 'Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida* v. *Thompson,* 305 U.S. 456, 467-468, 59 S. Ct. 275, 280, 281, 83 L. Ed. 285. In *Princess Lida* this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." [citations omitted].

> "We have already shown that these suits [sponsored by Moody] were repeated attempts to remove assets from the res of the receivership and liquidation proceedings. The federal courts have consistently

> followed the rule that proceedings involving the liquidation of the business and assets of an insurance corporation are in rem or quasi in rem proceedings. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U.S. 189, 194-95, 55 S. Ct. 386, 388, 79 L. Ed. 850, 854-55; *Jacobs* v. *DeShetter,* 465 F. 2d 840 (6th Cir.); *Gillis* v. *Keystone Mut. Casualty Co.,* 172 F. 2d 826, 829 (6th Cir.), *cert. denied,* 338 U.S. 822, 70 S. Ct. 67, 94 L. Ed. 499; *Holley* v. *General American Life Ins. Co.,* 101 F. 2d 172 (8th Cir.), *cert. denied,* 307 U.S. 615, 59 S. Ct. 1038, 83 L. Ed. 1496; *Liberty National Ins. Co.* v. *Reinsurance Agency, Inc.,* 307 F. 2d 164, 168 (9th Cir.); *Hutchins* v. *Pacific Mut. Life Ins. Co.,* 20 F. Supp. 150, 152 (S.D. Cal.), Aff'd, 97 F. 2d 58, 60 (9th Cir.).
>
> . . . We are convinced that [the receivership court] did not violate either the letter or the spirit of *Donovan.*"

Moody v. *State ex rel. Payne,* 295 Ala. at 307-08, 329 So. 2d at 79-80 (1976).

Based on its independent review of Moody's *Donovan* claim, the Fifth Circuit Court of Appeals was convinced that the *Allmon* case sought the destruction of the receivership and the Empire Receiver's possession and control of the assets of Empire. (Pet., App. B at 7a-8a). Because the Fifth Circuit's analysis and application of the in rem/quasi in rem exception to the *Donovan* principle are manifestly correct, the instant petition is due to be denied.

4. The Decision Of The Fifth Circuit Is Not In Conflict With Other Decisions.

The decision of the Fifth Circuit is not in conflict with any decision of another federal court.

The petition asserts a "clear conflict within four federal circuits." (Pet. at 15). No such conflict exists, and the cases cited by petitioner provide no reason for granting the instant petition.[10] Unlike any of the three cases cited in the petition, the injunction violated by Moody in the case at bar was based on undisputed evidence of Moody's persistent campaign to rule or ruin the Empire receivership proceedings with litigation and on testimony of Moody's threats to pursue the then Empire Receiver with litigation until it killed him. 295 Ala. at 304, 329 So. 2d at 76. Unlike the federal-court litigation in the cases cited in the petition, the *Allmon* litigation which Moody sponsored sought to restrain enforcement of every order or judgment entered by the Alabama Receivership Court and declaratory judgment that all actions taken by the Alabama Receivership Court were null and void. On these grounds, the federal circuit court below was convinced that the *Allmon* litigation which Moody sponsored in violation of the Alabama Receivership Court's injunction was "in hostile competition with the Receiver to wrest control and possession of Empire's assets and the Alabama orderly administration of the receivership out of the hands of the Receiver and Alabama Receivership Court." (Pet., App. B at 8a).

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[10] *Central States, Southeast & Southwest Areas Health and Welfare Fund* v. *Old Security Life Ins. Co.*, 600 F. 2d 671 (7th Cir. 1979); *Mills* v. *Roanoke Indus. Loan & Thrift*, 70 F.R.D. 448 (W.D. Va. 1975); *Slotkin* v. *Brookdale Hospital Center*, 357 F. Supp. 705 (S.D.N.Y. 1972). *Central States* involved appellate review of a district court order denying a motion to dismiss. The state-court injunction involved there was not specifically targeted against a particular litigant whom an evidentiary hearing had established was attempting to destroy, via litigation, the state receivership proceedings. The federal suit there, unlike the instant case, was purely *in personam*. The appellant in *Central States* admitted that the district court was not obligated to honor the state-court injunction, and the holding was simply that denial of a motion to dismiss the federal action was not a final, collateral order sufficient to support an appeal. 600 F. 2d at 677. The district court in *Mills* noted that the relief sought in the federal-court action there in-

As the Fifth Circuit's decision below is fully consistent with the decision of this Court in *Donovan* v. *City of Dallas,* and in no way conflicts with any decision of another federal court, the petition is due to be denied.

5. This Court Previously Denied Certiorari To Review The Alabama Judgments.

This court has previously declined to review the money judgments rendered by the courts of Alabama which were enforced by the federal courts below. The Alabama trial court entered judgment in favor of Protective on November 16, 1976; after trial by jury, the judgment in favor of the Empire Receiver was rendered on December 3, 1976. Moody appealed both judgments to the Alabama Supreme Court. The judgments, after slight reduction in amount, were there affirmed, and Moody thereafter petitioned this Court for writ of certiorari to the Supreme Court of Alabama. *Moody* v. *State ex rel. Payne,* 355 So.2d 1116, *cert. denied,* 439 U.S. 910, 58 L. Ed 2d 256 (1978). On that occasion, the sole issue Moody sought to have reviewed by this Court was the same issue as he seeks to raise by the instant petition, *i.e.* that the damage judgments against him were based upon a civil-contempt adjudication that, in turn, was based upon an injunction that was claimed to be invalid under the decision of this Court in *Donovan* v. *City of Dallas.* The petition was denied on October 16, 1978. The same result should obtain in this renewed collateral attack by Moody.

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volved was purely *in personam;* no facts remotely similar to the evidentiary basis for the state-court injunction in the case at bar were involved in *Mills;* the court there held simply that abstention doctrines were inapplicable. Likewise, in *Slotkin,* the federal district court held that a federal cause of action to decide a claim against funds being administered by the state court in no way interfered with the state court's custody and control of the receivership estate. 357 F. Supp. at 708.

6. Contrary To Assertions In The Petition, Moody Was Not Deprived Of Any Federal Right.

Petitioner was not deprived of any federal right, privilege or immunity. Throughout, the petition implies that enforcement of the Alabama Receivership Court's injunction deprived Moody of his constitutional rights. (Pet. at 3, 7, 8, 10, 12 & 17). The petition attempts to gloss over the stark reality that Moody had absolutely no federally guaranteed right to participate in the *Allmon* litigation. Moody was neither a party litigant in *Allmon* nor a member of the class of persons—Empire policyholders—ostensibly represented in the *Allmon* case. It is well settled that one party will not be allowed to assert in this Court the federal rights of another. *See Laird* v. *Tatum,* 408 U.S. 1, 15, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 166, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972). Accordingly, Moody's attempt in this case to assert purported federally secured rights of Empire policyholders is to be rejected. As no other deprivation is claimed by Moody, the conclusion is inescapable that the petition is due to be denied for lack of a jurisdictional basis for review by this Court.

7. The Petition Is Not Timely.

The only issue presented by the instant petition was conclusively decided against Moody by the Supreme Court of Alabama in February 1976, in the decision that disposed of Moody's appeal from the injunction of January 6, 1975. *Moody* v. *State ex rel. Payne,* 295 Ala. 299, 329 So. 2d 73 (1976). As we demonstrate under point 3, *supra,* the Alabama Supreme Court rejected as meritless Moody's claim that the injunction of the receivership court violated *Donovan.* The Alabama Supreme Court reiterated this holding in *Moody* v. *State ex rel. Payne,* 351 So. 2d 552, 554 (S. Ct. Ala. 1977). Moody sought no timely review by this Court of the 1976 decision of the Alabama Supreme Court rejecting his *Donovan* Claim. Yet, the petition now before this Court does not even acknowledge that the only

issue presented by it was decided against Moody nearly five years ago. For the independent reason that the purported federal question presented by the instant petition could only have been, but was not, presented by Moody after the 1976 decision by the Alabama Supreme Court, the instant petition is due to be denied.

8. **The Petition Is Factually Inaccurate.**

Many of the bold factual statements asserted in Moody's petition are belied by the record on appeal. For example, Moody did not intervene in the receivership proceedings "on a limited basis." (Pet. at 4). He entered a general appearance and actively participated in a two week trial (R 52-68) at the conclusion of which the Court approved Protective's plan to reinsure Empire's policies. Moody also submitted a plan for rehabilitation. *Moody* v. *State ex rel. Payne,* 344 So. 2d 160, 164 (S. Ct. Ala. 1977). Moody not only assisted Allmon "by providing him with counsel" (Pet. at 5); he drafted the amended complaint the filing of which—the very day after the Alabama Supreme Court denied Moody's challenge to the injunction on petition for extraordinary writ—resulted in the civil contempt adjudication and ultimately the damage judgments enforced by the Courts below. Moody's frequent assertions that the Alabama Receivership Court's jurisdiction was based on his "limited" participation are false (Pet. at 4, 6). *E.g.,* R 103-119, 122-130, 154-162, 425-429, 432, 434. Because Moody has failed to set forth an accurate, concise statement of facts material to consideration of the question presented, the instant petition should be denied.

9. **The Petition Provides No Basis For Moody To Evade Liability For Contempt.**

Petitioner cannot escape liability for contempt at this stage. Even if it be assumed, *arguendo,* that the Alabama Receivership Court's injunction was invalid under *Donovan,* and that the Alabama Supreme Court erroneously decided this issue in 1976,

and that the federal district and circuit courts below also erroneously decided this issue, Moody cannot thereby escape his liability for contempt after disobeying the injunction. *Cf. Walker* v. *City of Birmingham,* 388 U.S. 307 (1967). Accordingly, the money judgments that establish the amount of Moody's liability present no occasion for granting the instant petition.

CONCLUSION

Moody's pecksniffian arguments grossly distort the years of litigation that culminated in the Alabama damage judgments which the federal courts below accorded full forth and credit pursuant to the congressional mandate of 28 U.S.C. § 1738. This case truly involves no question of federal independence from state-court interference; it involves no departure by the federal courts below from this Court's decisions; and it involves no "collection-agency" adjudications by the many seasoned federal and state judges who have rejected Moody's boot-strap *Donovan* claim. The sole claim sought to be asserted by the petition has been rejected by each of the following: the trial and appellate courts of Alabama; the Alabama federal district court before which the *Allmon* case was pending; the Texas federal district court that enforced the Alabama damage judgments; and by the Fifth Circuit in its original decision and, again, in its decision on Moody's application for rehearing. The instant petition itself admits that this Court has thrice denied certiorari to review the issue. (Pet. at 15 & n.8). Contrary to Moody's assertion, this case manifests no judicial bias against him or "impatient rush to be rid of petitioner." (*Id.)* Rather, the petition embodies the incessant and scornful disregard by Moody for judicial proceedings that resulted in the damage judgments rendered against him over four years ago. The petition should be summarily denied. As we have shown, the petition is

frivolous, and this Court should award respondents appropriate damages under Rule 49 of the Rules of the Supreme Court.

Respectfully submitted,

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Proof Of Service

Proof of service of three copies of Respondents' Joint Brief in Opposition to Petition for a Writ of Certiorari, upon all parties separately represented by counsel, was filed by William A. Robinson, a member of the bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.

APPENDIX

APPENDIX

The full text of section 1738 is as follows:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

28 U.S.C. § 1738.

MAR 13 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1235

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SHEARN MOODY, JR.,

Petitioner,

v.

THARPE FORRESSTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

SHEARN MOODY, JR.,

Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Throughout this litigation, respondents have studiously avoided the substantive issues and have sought to inflame the lower courts with irrelevant slurs and innuendos concerning petitioner's character. Consistent with this

pattern, respondents now oppose the petition for writ of certiorari based on ad hominem attacks and baseless claims that petitioner has inaccurately presented his case. Respondents also devote several pages of their brief to unrelated litigation in which petitioner has been involved.[1] Significantly, however, the Brief in Opposition is virtually bare of authority on the merits of the petition. It is thus critical that respondents' tactical smokescreen not be permitted to distract the Court from the important issues raised in the case.

I.

Respondents ask the court to deny certiorari based on an issue not decided by the courts below; namely, that the state court judgment was entitled to full faith and credit even if it was invalid. In support of this contention, respondents cite only a series of Fifth Circuit opinions, none of which consider the issue directly and most of which were decided on a summary basis. *See* Brief in Opposition at 8-9. Respondents' claim of a "firmly established rule" of course ignores the many decisions of this Court holding that there are exceptions to the full faith and credit principles; *see, e.g. Nelson v. George,* 399 U.S. 224 (1970) (penal judgments), *Griffin v. Griffin*, 327 U.S. 220, 228 (1946) (lack of procedural due process), *Cole v. Cunningham*, 133 U.S. 107 (1890) (fraud), particularly where, as here, the judgment sought

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[1] Respondents cite thirteen opinions in which petitioner has been a named party for the proposition that he has unjustifiably flooded the courts with litigation. Respondents neglect to point out that petitioner was plaintiff in only one of the thirteen cases, Moody v. Moody National Bank, 522 S.W. 7d 710 (1975). In the remainder, petitioner litigated in the capacity of a defendant or an intervenor in receivership proceedings which sought to strip him of his controlling share of a multimillion dollar insurance company.

to be enforced was unconstitutional or invalid. *See, e.g. Hanson v. Denckla*, 357 U.S. 235 (1958); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912). *Cf. Hood v. McGehee*, 237 U.S. 611 (1915) and *Fall v. Eastin*, 215 U.S. 1 (1909) (limited exceptions for judgments involving adoption and property titles).[2]

In any event, neither the District Court nor the Fifth Circuit considered the full faith and credit issue. Indeed, while respondents urged the district court to enforce the judgment, they never specifically raised the claim that even an invalid judgment is entitled to full faith and credit. Both the district court and the Fifth Circuit decisions rested exclusively on the holding that the *in rem* exception to the principles of *Donovan v. City of Dallas* should be extended and applied to petitioner's situation to hold the Alabama state court injunction valid. That is the issue presented by this petition. The full faith and credit question, even if it had been properly raised below and were of substance (which it is not, see cases cited *supra*), would at most require summary reversal and remand to the Fifth Circuit for decision of that issue. *See, e.g., United States v. United Continental Tuna Corp.*, 425 U.S. 164, 182 (1976); *Wood v. Strickland*, 420 U.S. 308, 326-7 (1975), *reh. denied*, 421 U.S. 921 (1975); *Scherk v. Alberto-Culver Co* 417 U.S. 506, 516 n. 9 (1974); *Logue v. United States*, 412 U.S. 521, 532-3 (1973); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-8 (1971);

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[2] Petitioner claimed the benefit of several of these exceptions below, particularly the "penal judgment" exception. *See, e.g., Nelson v. George, supra;* Huntington v. Attrill, 146 U.S. 657 (1892); The Antelope, 23 U.S. (10 Wheat) 66, 123 (1825). The lower court decisions discussed the merits only of the *Donovan* issue, which petitioner has presented to this court.

United States v. Estate of Donnelly,, 397 U.S. 286, 295 n. 5 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 156 (1967).

II.

Respondents' Brief in Opposition virtually concedes the correctness of petitioner's exposition of the lower court's departure from the Court's *Donovan* doctrine. Respondents do not contest that

(1) the lower courts enforced the Alabama judgment because of their determination that the injunction upon which it was based was valid;

(2) the lower courts upheld the validity of the injunction on the basis that the *in rem* exception to the *Donovan v. City of Dallas* rules applied;

(3) the *Allmon* case, although it might potentially have affected the Alabama receivership proceedings, was not *in rem*.

In support of their argument that the lower courts' expansion of the exception to *Donovan* was correct, respondents cite as sole authority the decisions of the Fifth Circuit and the Alabama Supreme Court *in the instant case*. *See* Brief in Opposition at 10-12. As the petition points out, such a radical and unsupported departure from the precedent established by this Court is not the province of lower courts. It should not be countenanced except by this Court.

III.

Without any explanation, respondents deny the existence of any conflict among the circuits concerning the issue petitioner raises. Respondents' description of and allegations concerning the background of the *Allmon*

litigation in no way changes the indisputable fact that it sought *in personam* relief; that is, damages and declaratory relief regarding the constitutional validity of certain Alabama receivership statutes. To the extent *Allmon* may have had a potential effect on the receivership, it was identical to the lawsuit at issue in *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979), which the Seventh Circuit nonetheless held to be *in personam*. *Id.* at 675 n.7. The decision in the instant case thus conflicts squarely with that court's decision in *Central States*, as well as the decisions of the district courts in *Mills v. Roanoke Ind. Loan & Thrift*, 70 F.R.D. 448 (W.D.Va. 1975) and *Slotkin v. Brookdale Hospital Center*, 357 F.Supp. 705 (S.D.N.Y. 1972).

IV.

Respondents argue that Moody "had absolutely no federally guaranteed right to participate in the *Allmon* litigation." Brief in Opposition at 15. Their contention, which was not seriously raised below, is utterly frivolous. This Court has long held that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971). *See also In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976) (expenditure to support cause is constitutionally protected).

V.

Throughout the Brief in Opposition respondents assert that petitioner has inaccurately presented the facts of the case. These assertions are patently baseless.

Comparison of petitioner's statement of the case with respondents' presentation reveals no fact differences. Petitioner's statement, if anything, is more complete. Noticeably absent from respondents' presentation is any description of the *Allmon* case. Respondents apparently wish to hide its *in personam* nature from this Court.

Respondents cite only one asserted "example" of inaccuracy. Brief in Opposition at 16. It is the statement in the petition that petitioner "moved to intervene in the receivership proceedings on a limited basis." Pet. at 4. That statement is precisely accurate.[3] The record of the receivership proceeding is unequivocal that petitioner moved to intervene in the receivership for the sole purpose of opposing liquidation and reinsurance of the insurance policies of Empire Life and to propose a plan of rehabilitation.[4]

The Alabama circuit court and the receiver refused to permit him to intervene on this limited basis, but instead requested him to agree to enter a full appearance, submit all potential legal claims in the receivership court, and agree to be bound by an injunction prohibiting his filing of any actions in other courts or jurisdictions. Petitioner declined to agree to this expansion of his limited appear-

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[3] Petitioner regrets the necessity to go beyond the record below to demonstrate the inaccuracy of respondents' own ex-record characterization of the Alabama receivership proceedings.

[4] Appendix 1, Complaint in Intervention. R. at 378-86.

ance[5] and the court denied the intervention motion.[6] Six months later the circuit court reversed itself at respondent's instance,[7] without any change in petitioner's position that he would only intervene in a limited manner.[8] Thus petitioner's statement was wholly accurate, and respondents' statements to the contrary are a blatant misrepresentation to the Court.[9]

CONCLUSION

This case presents a single issue, significant both to individual litigants such as petitioner and to the administration of justice in the state and federal courts. The brief of the Washington Legal Foundation, which has moved for leave to intervene as *amicus curiae*, demonstrates the national importance of the issue.[10] Respondents, through

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[5] Appendix 2, excerpts from Transcript of October 19, 1973.

[6] Appendix 3, excerpts from Decree of October 22, 1973. *See also* Appendix 2.

[7] Appendix 4, Petition for Reconsideration; Appendix 5, Order of April 8, 1974.

[8] Appendix 3, excerpts from Decree of October 22, 1973.

[9] Petitioner notes that this misrepresentation could not have been an innocent error. James W. Webb, counsel for the Respondent Commissioner before this Court, was present at the hearing on petitioner's limited intervention motion. He personally urged the court to require petitioner to enter a full appearance if he wished to intervene, which petitioner refused to do.

> . . . we have no objection to Mr. Moody coming in to this Court, but if he comes in I want him to be enjoined from proceeding in any other court. . . .

See Appendix 2.

[10] The issue is not only important generally to the proper relationship between State and federal courts, which the Court balanced in *Donovan*, but more specifically to the rights of litigants

[footnote continued]

misrepresentations and invective, have attempted to distract the Court from the merits. Petitioner respectfully submits that this Court should pierce respondent's smokescreen, and consider the substance of the open question which the decisions of the courts below have raised.

Respectfully submitted,

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(Attorney of Record)
FRED C. ZACHARIAS
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Counsel for Petitioner.

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when an insurance company falls under a state receivership. Thirty-two other states have receivership statutes identical or nearly identical to the Alabama provision that spawned the invalid injunction here. Appendix 6. Allowing the decision below to stand would encourage a rash of State court injunctions, like that here, going beyond *Donovan*-permitted bounds. The National Association of Insurance Commissioners' Insurers' Supervision, Rehabilitation, and Liquidation Model Act, Article I, § 5(A)(6), provides for injunctions against "the institution or further prosecution of any actions or proceedings." NAIC makes no distinction between in rem and in personam actions, or between state and federal actions.

APPENDIX 1

CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT
OF ALABAMA
(IN EQUITY)

CASE NO. 171-687

STATE OF ALABAMA, EX REL,
JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,

PLAINTIFF,

VS.

EMPIRE LIFE INSURANCE COMPANY
OF AMERICA, an Alabama Corporation,

DEFENDANT,

SHEARN MOODY, JR.,

INTERVENOR AS A DEFENDANT.

COMPLAINT IN INTERVENTION

Intervenor, Shearn Moody, Jr. shows the Court as follows:

1. That Shearn Moody, Jr. is the largest single stockholder of Empire Life Insurance Company.

2. That pursuant to an Order entered by this Court on June 29, 1972, John G. Bookout, Commissioner of Insurance of the State of Alabama, was appointed as Receiver to "continue to operate the business of the said Empire Life Insurance Company of America to the end

of rehabilitating said Company under the further orders and directons of the Court." (Paragraph 3, Decree for Injunction and Appointment of Receiver).

3. That on December 19, 1972, the said Receiver filed with the Court a "Petition for Instruction and Approval of Plan of Rehabilitation for Empire Life Insurance Company of America", with a plan for such rehabilitation set forth.

4. That on January 19, 1973, the said Receiver filed a second Petition for Instruction and Approval of Plan of Rehabilitation for Empire Life Insurance Company of America with another separate plan of rehabilitation set forth.

5. That this Honorable Court on January 26, 1973, entered an Order to receive definite offers or proposals with respect to the assets and estate of said Empire Life Insurance Company of America and for a notice to be published in various newspapers and The Wall Street Journal entitled, "NOTICE OF PROPOSALS FOR THE PROPERTY, ASSETS AND ESTATE OF EMPIRE LIFE INSURANCE COMPANY OF AMERICA *OR FOR ITS REHABILITATION*". (Emphasis added).

6. That this Honorable Court on February 15, 1973, entered an Order setting aside the previous Order of January 26, 1973.

7. That on May 10, 1973, the said Receiver filed a Petition for Instructions Regarding Reinsurance and sought, in part, the Court's authorization for the Receiver to seek Federal and State regulatory clearance for an advertisement extending an invitation for proposals for a total reinsurance of all business of Empire Life Insurance Company of America, nor any of its counsel of record in this cause; and no notice of such Petition was given to the

stockholders or creditors of Empire Life Insurance Company of America.

8. That this Honorable Court on May 10, 1973, entered an Order which authorized the Receiver to forthwith petition all applicable Federal and State regulatory agencies for approval of an advertisement to extend an invitation for proposals for a total reinsurance of all business and payment of all creditors of Empire Life Insurance Company of America. A copy of such Order was not sent to defendant or any of its counsel of record in this cause.

9. That on September 6, 1973, the said Receiver filed with the Court an Ex Parte Petition for Instructions Regarding Reinsurance, requesting that this Court enter an Order authorizing the Receiver to advertise and extend an invitation for proposals for a total reinsurance of all business of Empire Life Insurance Company of America and payment of all valid and approved claims of creditors. Such petition was supported by a Resolution, dated August 29, 1973, executed by the Commissioners of Insurance, Superintendents of Insurance, and Ancillary Receivers from affected states which authorized the Receiver to file such petition with this Court. However, a copy of such petition and resolution was not served on the defendant in this cause, Empire Life Insurance Company of America, or any of its counsel of record in this cause. Further, no notice of such petition was given to the stockholders or creditors of Empire Life Insurance Company of America. In addition, no hearing was had with respect to such petition.

9. That this Honorable Court on September 12, 1973, entered an Ex Parte Order, based, in part, upon the Resolution of the affected Commissioners of Insurance,

Superintendents of Insurance, and Ancillary Receivers, authorizing the Receiver to advertise and extend an invitation for proposals for a total reinsurance of all the business of Empire Life Insurance Company of America and set forth the form of notice to be published which notice did not set forth "or for its rehabilitation". Copies of said Order were not sent to defendant, Empire Life Insurance Company of America, or any of its counsel of record. Further, copies of said Order were not disseminated to stockholders or creditors of Empire Life Insurance Company of America.

WHEREFORE, PREMISES CONSIDERED, Intervenor prays that this Court set aside and hold for naught its Orders issued on May 10, 1973, and September 12, 1973, or in the alternative that this Court order an immediate stay of such Orders until all interested persons are notified and a full hearing is conducted with respect to plaintiff's Petition for Instructions regarding reinsurance filed with the Court on September 6, 1973, and as grounds, submits the following:

A. The total absence of notice to defendant, and its policyholders, creditors and stockholders and the ex parte nature of such orders constitutes a denial of due process guaranteed by the Fourteenth Amendment to the Federal Constitution. The original Order of the Court dated June 29, 1972, entered after a full hearing, provides for the appointment of a Receiver for the rehabilitation of defendant. The Court has now embarked upon a scheme of liquidation of defendant without any notice to defendant and without conducting any additional hearings or inquiries whatsoever. There is no factual justification for defendant's liquidation.

B. The total absence of notice to Defendant's creditors is in violation of Sections 636, 638 and 650 of the

Alabama Insurance Code, Act No. 407, Acts of Alabama 1971.

C. The total absence of notice to Intervenor, and other stockholders of defendant, and the ex parte nature of the Orders of May 10, 1973, and September 12, 1973, is in violation of the procedures set forth in the Alabama Insurance Code, Act No. 407, Acts of Alabama 1971.

D. There is no evidence in the record to support the Receiver's Petition to accept orders for the liquidation or reinsurance of defendant. The last hearing conducted by the Court relative to the overall affairs of defendant resulted in the June 29, 1972 Order for the appointment of a receiver for defendant's rehabilitation.

E. Based on this Court's Ex Parte Order of September 12, 1973, advertisements have been and are being published in various newspapers and The Wall Street Journal to solicit bids or proposals for the reinsurance of the entire business of defendant, as well as all the property, assets, and estate of defendant, thereby causing irreparable harm and damage to the business reputation of defendant, its policyholders, creditors and stockholders.

F. The Order of September 12, 1973, represents a complete abandonment of the Court's original determination to rehabilitate Empire Life Insurance Company of America as announced in the Order of June 29, 1972. The Court has now embarked upon a course leading to the complete liquidation of defendant without having given defendant's stockholders notice or an opportunity to be heard with respect to its divestiture.

G. The Court's requirement of a $15,000,000 capital surplus unreasonably limits the number of companies eligible to bid on defendant's assets, thereby affecting the

value of Intervenor's stock. Such figure was apparently determined arbitrarily without giving defendant's stockholders an opportunity to be heard or to prevent evidence indicating the impropriety of such a restrictive figure.

SIROTE, PERMUTT, FRIEND & FRIEDMAN, P.A.

By _____

E. M. Friend, Jr.

_____

Thomas R. Beech

APPENDIX 2

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT IN AND FOR
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CASE NO. 171-687

STATE OF ALABAMA, ex rel
JOHN G. BOOKOUT,
Commissioner of Insurance,

COMPLAINANT,

VS.

EMPIRE LIFE INSURANCE COMPANY
OF AMERICA, an Alabama corporation,

RESPONDENT.

CAPTION

THE ABOVE ENTITLED CAUSE came on to be heard before the Honorable William C. Barber, Judge, commencing on the 19th day of October, 1973, at or about 2:00 o'clock P.M. when the following proceedings were had and done:

APPEARANCES:

MR. JAMES W. WEBB, of the firm of Alton, Leavell, Morgan and Webb, Attorneys at Law, 650 South McDonough Street, Montgomery, Alabama, 36102, appearing for the Receiver.

MR. CHARLES BARNES, Assistant Attorney General, State of Alabama, Montgomery, Alabama, appearing for the Receiver.

MR. E. M. FRIEND, JR. and MR. JAMES HARRIS, of the firm of Sirote, Permutt, Friend and Friedman, Attorneys at Law, First Federal Building, Birmingham, Alabama,

PROCEEDINGS:

(Whereupon the following proceedings were held in the Court's Chambers.)

THE COURT: All right, let's make it formal. Let the record show that there are four motions for consideration and determination by the Court set for this afternoon.

The first motion in order of time the Court elects to take up is a motion to intervene filed by Shearn Moody, Jr., on October 12, 1973

* * *

MR. WEBB: Your Honor, we offered, as I said, we understood Mr. Moody's circumstances as a very peculiar situation because of the stock situation of this company. He owns something like, I believe, 98% of the voting stock. He is the principal stockholder and Chairman of the Board and President of the company, and certainly he is affected by the proceedings of this Court.

We realize, too, that there are numerous cases that says the stockholder has no standing in this Court, but we, the Commissioner, as Receiver, would offer no objection to him coming in. We would like for it to be on a limited basis, and we would also ask the Court to restrict him in the same manner that it has restricted the other officers of the Defendant corporation from proceeding outside the receivership court, that is by bringing any actions in other courts adverse to the receivership court, that is by bringing any actions in other courts adverse to the receivership court.

THE COURT: Are you willing to come in under that restriction?

* * *

MR' BEECH: Your Honor, I don't think it's possible for us to come in on that proposition.

* * *

I don't see how you can limit him and enjoin him from pursuing other remedies in other states in other forms until this Court rules on the jurisdiction question which we filed before the Court trying to obtain jurisdiction over all of the commissioners in one place because we have to deal with them in Arkansas and we have to deal with them in Montana and Texas, certainly.

* * *

THE COURT: . . . What I'm trying to do is to assist, if I can, in the rehabilitation of the company, but I don't want—I want friends in camp, I don't want people who are going to take an adversary position while they're in this case as parties. The purpose of which said case is to rehabilitate the company, to be allowed to take some adversary position, and that is the reason why the original order was made barring that sort of activity. If he is going to get into the picture and get into the interworkings of the rehabilitory efforts and from that position he is going to fire into the camp, so to speak, to project his own personal interests, and I imagine that is what he's in here for, I would think so, if he didn't have a personal interest I don't suppose he would want to intervene. Now these people that are outside that are going to bid, they don't yet have any personal interest but he does, his is already established. So I think it's only fair for him to take the

same posture and same position that they do relative to his dealings with the company.

Now if he wants to stay on the outside and take pot shots he has got a perfect right to do it, but to put him in here and then let him file adversary actions, I don't think that is—I think it's anomalous and I won't permit it, I will tell you that now.

* * *

MR. WEBB: But we don't want to be harassed, but we particularly don't want him filing any suits outside of this, out of this court. We want them entered right here.

MR. FRIEND: We would be delighted for everything to be administered here if you will bring all of the insurance commissioners and everything else before us and then let Judge Barber control the whole thing, but I don't see how, in view of the fact that other actions being taken by other insurance commissioners in other states, that Mr. Moody should not be in a position to defend himself in other states, if he came in—

* * *

MR. WEBB: Your Honor . . . what I am seeking here, as I have said, we have no objection to Mr. Moody coming into this Court, but if he comes in I want him to be enjoined from proceeding in any other court in a disruptive manner so as to try to disrupt the proceedings and the orderly administration of this receivership as it's presently proceeding in this Court, and I could cite examples, they're hearsay at the present time, but this is really what I'm driving at.

MR. FRIEND: Mr. Webb, I ask you the question whether your interest and perhaps the Court's wouldn't be better served by having Mr. Moody in here because it

seems to me that if he is before this Court than the Court and you, through the Courts, have much more ability and authority to control anything that you consider to be disruptive than if he is outside the Court?

MR. WEBB: As I said, Mr. Friend, we had no objection, but I want the control to begin with, and with that understanding that he's not going to, for example, seek in concert with members of the—members of the Board of Directors of NICOA to file an action in Federal Court in North Dakota seeking to disrupt the proceedings in this Court. This type of thing, and if I have to bring in testimony to the effect that has been done, I will bring it in, but this is the only thing I want to know, if he is going to come into this Court, then I want him subject to that same thing, that he is subjecting himself to the jurisdiction of this Court, and he will be enjoined from proceeding outside of this Court in a matter in any court, either he or in concert with others, so as to disrupt this proceeding.

THE COURT: Does anybody else want to talk?

MR. BEECH: Your Honor, we couldn't live with that in the present posture of this case until the Court rules on the jurisdiction over all of the commissioners and issuing an order restricting their activities in the same manner that Mr. Webb is implying that Mr. Moody is acting and going to be restricted. That is an impossible limitation on Mr. Moody.

* * *

THE COURT: All right, Gentleman, are y'all through with your arguments and statements on the motion to intervene as a Defendant that is filed by Shearn Moody, Jr. on October the 12th, 1973? Then let the record show that the motion is denied.

APPENDIX 3

CIRCUIT COURT, TENTH JUDICIAL
CIRCUIT OF ALABAMA
EQUITY DIVISION

CASE NO. 171-687

STATE OF ALABAMA, EX REL
JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE

PLAINTIFF

VS.

EMPIRE LIFE INSURANCE
COMPANY OF AMERICA, an
Alabama corporation

DEFENDANT

DECREE RE: MOTIONS

This cause came on to be heard and was heard on Friday, October 19, 1973 in chambers by the Court and present were counsel of record for Plaintiff, Defendant and Shearn Moody, Jr. The purpose of the hearing was for the presentation and hearing of the following four petitions or motions . . . .

4. "Motion To Intervene As A Defendant" as filed on October 12, 1973 by Shearn Moody, Jr.

The Court heard arguments and statements, at length, by the several counsel and its findings are set forth hereinafter.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows: . . .

FOUR: The "Motion To Intervene As A Defendant" as filed on October 12, 1973 by Shearn Moody, Jr. is disallowed, denied and overruled.

DONE and ORDERED this the 22nd day of October, 1973.

CIRCUIT JUDGE IN EQUITY SITTING

cc: Hon. Charles Barnes
Hon. Jim Webb
Hon. Ed Friend, Jr.
Hon. Thomas Beech
Hon. Murray Sams, Jr.
Hon. Francis Hare
Hon. Ark Monroe, III
Hon E.V. Omholt
Hon. J.M. Jackson
Hon. J. O. Wigen
Hon. Joe B. Hunt
Hon. Clay Cotton

APPENDIX 4

CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT
OF ALABAMA
EQUITY DIVISION

CASE NO. 171-687

STATE OF ALABAMA, EX REL,
JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,

PLAINTIFF,

VS.

EMPIRE LIFE INSURANCE COMPANY
OF AMERICA, an Alabama Corporation,

DEFENDANT,

and

SHEARN MOODY, JR.

INTERVENOR

PETITION FOR RECONSIDERATION OF MOTION FOR INTERVENTION

COMES NOW, John G. Bookout, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America, an Alabama Corporation in receivership, and petitions this Honorable Court for reconsideration of that decree heretofore rendered on the 22nd day of October, 1973, denying and overruling the motion to intervene as a defendant heretofore filed on October 12,

1973, by Shearn Moody, Jr., and as grounds for said petition sets down and assigns the following:

(1) At the time the motion of Shearn Moody, Jr., an applicant for intervention as a party defendant, was filed, the basis of his complaint was that that Order heretofore entered on September 12, 1973, for advertisement of reinsurance was premature in that said advertisement proposed plans and proposals for reinsurance contemplating and subject to further hearings and consideration.

(2) That subsequent to the said Order of October 22, 1973, the Court and your Receiver have received proposals of reinsurance which now change and alter the positions heretofore taken by the Receiver and materially affect the status of the receivership and rehabilitation efforts of the Receiver.

(3) Shearn Moody, Jr., an applicant for intervention as a party defendant is recognized as President and Chairman of the Board of Directors for defendant corporation in receivership and the largest single stockholder of outstanding common capital stock of Empire Life Insurance Company of America and that as such Shearn Moody, Jr., does have an interest in said company over and above that interest possessed by other persons.

WHEREFORE PREMISES CONSIDERED, John G. Bookout, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America, consents to intervention of Shearn Moody, Jr., as a party defendant in this cause and prays that this Honorable Court will reconsider its decree heretofore entered on October 22, 1973, denying the motion to intervene. Your petitioner further prays that this Court will enter such orders as it

may deem necessary granting to the said intervenor status as a party.

Respectfully submitted,

John G. Bookout
Commissioner of Insurance
Receiver of Empire Life Insurance
Company of America

By: _____
James W. Webb
Attorney for Receiver

Of Counsel:

James W. Webb
138 Adams Avenue
Montgomery, Alabama 36104

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition has been served on Honorable E. M. Friend, Jr., Sirote, Permutt, Friend and Friedman, P.A., Attorney for Defendant, First Federal Building, First Avenue and Twenty-first Street, Birmingham, Alabama 35203 by depositing a copy in the United States mail postage prepaid this the 8th day of January, 1974.

James W. Webb
Counsel

APPENDIX 5

IN THE CIRCUIT COURT FOR
THE TENTH JUDICIAL CIRCUIT
OF ALABAMA – IN EQUITY

CASE NO. 171-687

STATE OF ALABAMA, EX REL.
JOHN G. BOOKOUT, COMMISSIONER
OF INSURANCE,

Plaintiff,

v.

EMPIRE LIFE INSURANCE
COMPANY OF AMERICA, an
Alabama corporation,

Defendant.

ORDER

This matter coming on to be heard this date on the petition of the Honorable John G. Bookout, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America, for reconsideration of motion for intervention filed on October 12, 1973, by Shearn Moody, Jr., it is hereby

ORDERED, ADJUDGED and DECREED that the Court's prior decree of October 22, 1973, denying the motion of Shearn Moody, Jr. to intervene is hereby overruled and the motion to intervene is hereby granted; it is further

ORDERED, ADJUDGED and DECREED that the complaint of intervenor is set down for hearing on the

13th day of February, 1974, at 9:00 A.M. and the Receiver is given ten days from the date of this order to file its answer to the complaint of intervenor.

Entered and ordered in Birmingham, Alabama, this the 8th day of January, 1974.

CIRCUIT JUDGE IN EQUITY SITTING

COPIES TO:

Hon. Ed Friend, Jr.
Hon. Thomas Beech
Hone. Murray Sams, Jr.
Hon. Francis Hare
Hon. Herbert Crook
Hon. Ted James
Hon. Melvin Kammerlohr
Hon. Allan Horne
Hon. Robert Alphson
Hon. John Bookout
Hon. Ark Monroe, III
Hon. E. V. Omholt
Hon. J. M. Jackson
Hon. J. O. Wigen
Hon. Joe B. Hunt
Hon. Don Odum
Hon. Tom McFarling

APPENDIX 6

Alabama Code tit. 27, §27-32-5(b) (1977) provides (emphasis added):

> (b) The court may, at any time during a proceeding under this chapter, issue such other injunctions or orders *as may be deemed necessary to prevent* interference with the commissioner or the proceeding, or waste of the assets of the insurer, or *the commencement or prosecution of any actions,* or the obtaining of preferences, judgments, attachments or other liens or the making of any levy against the insurer or against its assets or any part thereof.

Twenty-four other states have virtually identical provisions:

Alaska Stat. §21.78.030(b) (1966)
Ariz. Rev. Stat. Ann. §20-614(B) (1975)
Ark. Stat. Ann. §66-4804(2) (1980)
Del. Code Ann. tit. 18, §5904(b) (1975)
Fla. Stat. Ann. §631.041(2) (West 1972)
Ga. Code Ann. §56-1414(2) (1977)
Haw. Rev. Stat. §431-670(b) (1976)
Idaho Code §41-3305(2) (1977)
Me. Rev. Stat. tit. 24-A, §4362(2) (1974)
Md. Ann. Code art. 48A, §135(2) (1979)
Minn. Stat. Ann. §60A.04(24) (West 1968)
Nev. Rev. Stat. §696B.270(2) (1977)
N.J. Stat. Ann. §17.30C-5(b) (West Supp. 1980)
N.Y. Ins. Law §528(2) (McKinney 1966)
N.C. Gen. Stat. §58-155.19(b) (1975)
Okla. Stat. Ann. tit. 36, §1904(B) (West 1976)
Or. Rev. Stat. §734.140(2) (1979)
S.D. Compiled Laws Ann. §58-29-12 (1978)
Tenn. Code Ann. §56-9-105 (1980)
Tex. Ins. Code Ann. tit. 21-28, §4(b) (Vernon 1963)
Utah Code Ann. §31-28-19(2) (1974)

Wash. Rev. Code Ann. §48.31.200(2) (1961)
W. Va. Code §33-10-4(b) (1975)
Wyo. Stat. §26-33-104(b) (1977)

Eight additional states' statutes, in slightly different form, empower courts to issue injunctions or orders deemed necessary to prevent ". . . the institution or prosecution of any actions or proceedings." They are:

Cal. Ins. Code §1020(c) (West 1972)
Conn. Gen. Stat. §38-425(a)(6) (1981)
Ind. Code Ann. §27-9-1-4(6) (Burns Supp. 1980)
Ky. Rev. Stat. §304.33-050(f) (1981)
Mont. Rev. Codes Ann. §33-2-1309(f) (1979)
N.H. Rev. Stat. Ann. §402-C:5(f) (Supp. 1979)
40 Pa. Cons. Stat. Ann. §221.5(a)(vi) (Purdon Supp. 1980)
Wis. Stat. Ann. §645.05(f) (1980)

No. 80-1235

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHEARN MOODY, JR.,
Petitioner,

vs.

THARPE FORRESTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,
Respondent,

SHEARN MOODY, JR.,
Petitioner,

vs.

PROTECTIVE LIFE INSURANCE COMPANY,
Respondent.

JOINT RESPONSE IN OPPOSITION TO MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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No. 80-1235

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Respondent,

SHEARN MOODY, JR.,
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VS.

PROTECTIVE LIFE INSURANCE COMPANY,
Respondent.

JOINT RESPONSE IN OPPOSITION TO MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

This joint response is filed on behalf of Respondents, Protective Life Insurance Company ("Protective") and Tharpe Forrester, Commissioner of Insurance of the State of Alabama, as Receiver of Empire Life Insurance Company of America ("Empire Receiver"). This joint response of Protective and the Empire Receiver is made in opposition to the motion of the Washington Legal Foundation ("WLF") for leave to file a brief *amicus curiae* in support of the pending petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petitioner is Shearn Moody, Jr. ("Moody").

1. The motion and brief filed by WLF are not accompanied by written consent of Protective and the Empire Receiver, as is contemplated by Rule 36.1 of the Rules of the Supreme Court of the United States. Contrary to the assertion in the WLF motion, counsel for Protective was not contacted concerning the filing of the WLF motion and brief.

2. Rule 36.1 provides, in pertinent part, that "a motion for leave to file such a brief when consent has been refused is not favored." Protective and the Empire Receiver hereby refuse consent.

3. The motion and brief of WLF falsely state that Willie Allmon's interests are at state. (WLF motion at *iii;* WLF brief at 3, 12).

4. Contrary to assertions in the WLF brief, Willie Allmon's involvement in the *Allmon* litigation was not adversely affected by the injunction of the Alabama Receivership Court which is sought to be challenged by the instant petition.

5. The proposed brief of WLF totally distorts the proceedings in *Willie Allmon* v. *John G. Bookout, et al.,* Civil Action No. 74-377-N (M.D. Ala)., *on appeal* No. 75-2104 (5th Cir.). Protective and the Empire Receiver were parties defendant in the *Allmon* litigation, which was pending in the United States District Court for the Middle District of Alabama in 1975 and, on remand from the United States Circuit Court of Appeals for the Fifth Circuit, in 1976. The following matters of record dispel the distortion attempted by WLF and Moody:

(a) By decree entered June 14, 1974, the Alabama Receivership Court authorized and directed the Empire Receiver to accept and execute a reinsurance agreement with Protective. This decree also ordered the Empire Receiver to proceed with liquidation of Empire. (Appendix A).

(b) The amended complaint in *Allmon* sought a federal-court injunction to prevent liquidation of Empire and to prevent the

Empire Receiver and Protective from taking any steps to consummate the reinsurance agreement. The amended complaint also sought a declaration by the federal court that any action taken in the Alabama Receivership Court was null and void. (Appendix B).

(c) On April 24, 1975, the federal district court in *Allmon* granted summary judgment in favor of the Empire Receiver, Protective, and others. (Appendix C). In its memorandum opinnion of the same date, the federal district court construed the *Allmon* amended complaint as follows:

> "Effectively what the Plaintiff would have this Court do would be to assert omnipotent power and to wrest control of the receivership estate from a State Court of competent jurisdiction, thereby materially disrupting if not destroying the orderly function and execution of the State Court and its procedures.
>
> (Appendix D, at A-10)

(d) The same day that the federal district court in *Allmon* granted summary judgment in favor of the Empire Receiver and Protective, notice of appeal to the United States Court of Appeals for the Fifth Circuit was filed. (Appendix E). Also on the same day, a motion for injunction pending appeal was served. The motion sought an injunction from the federal appellate court prohibiting Protective and the Empire Receiver from taking any steps to consummate the reinsurance agreement "or from making any disposition in any way of any assets" of Empire. On April 28, 1975, a panel of the Fifth Circuit (Circuit Judges Coleman, Ainsworth and Simpson) denied the motion for injunction.

(e) On May 5, 1975, Moody's attorneys who purported to represent Allmon served a "Motion for Protective Order and Motion for Injunction Pending Expedited Appeal." This motion also sought "[a]n injunctive order, pending resolution of

[Allmon's] appeal... restraining [Protective, the Empire Receiver and others] from taking any further steps to execute or consummate [the reinsurance agreement] in any and all of its aspects...." This motion specifically relied on the case of *Donovan* v. *City of Dallas,* 377 U.S. 408 (1954). On May 7, 1975, the Fifth Circuit denied Allmon's motion to expedite appeal and denied Allmon's motion for injunction pending expedited appeal. (Appendix F).

(f) During the course of Allmon's appeal to the Fifth Circuit, Willie Allmon voluntarily terminated his status as an Empire policyholder and, accordingly, Protective and the Empire Receiver sought dismissal of the appeal on grounds of mootness. See Appendix G (copy of Protective's motion to dismiss the *Allmon* appeal).

(g) By order dated November 18, 1975, the Fifth Circuit vacated the appeal and remanded the cause to the district court for appropriate findings of fact and conclusions of law, after an adversary hearing, as to whether the appeal had been mooted. (Appendix H).

(h) On remand, attorneys for Allmon and Moody sought "protection" in the federal district court from the January 6, 1975 injunction of the Alabama Receivership Court. The federal district court denied "protection." (Appendix I).

(i) The federal district court expressly noted that the Alabama Receivership Court had modified the injunction, by order entered December 16, 1975 "which stated that no action will be taken to interfere with Willie Allmon's active and full participation in the proceedings on the mootness question." (Appendix I, at A-24).

(j) The federal district court also noted that the Alabama Supreme Court had affirmed the January 6, 1975 injunction. *(Id.)*

(k) The federal district court expressly held that the case of *Donovan* v. *City of Dallas* was inapposite. (Appendix I, at A-27 - A-28).

(l) On May 14, 1976, an evidentiary hearing was conducted by the federal district court. Protective offered testimony of two witnesses and a number of documentary exhibits. The Empire Receiver adopted Protective's evidence. Allmon offered no evidence, but his counsel did cross-examine Protective's witnesses. On June 28, 1976, the federal district court entered final judgment dismissing the *Allmon* action. The judgment of the district court, together with its memorandum opinion incorporating its findings of fact and conclusions of law, are attached as Appendix J. The federal district court concluded, in pertinent part, that Willie Allmon had not been injured or damaged in any way by the receivership proceedings and that Allmon had intentionally and voluntarily surrendered his Empire policy. No appellate review of the dismissal of the *Allmon* action was sought by any party.

6. Contrary to assertions in the WLF brief, Moody has engaged in vexatious and harassing litigation, which resulted in explicit findings by the Alabama Receivership Court and the Alabama Supreme Court. *E.g. Moody* v. *State ex rel. Payne,* 329 So.2d 73, 75-77 (S. Ct. Ala. 1976).

7.The WLF contends in brief that the Alabama Receivership Court's injunction against Moody was overly broad. The Alabama Supreme Court expressly rejected this argument over five years ago on Moody's unsuccessful appeal from the injunction. 329 So.2d at 78-79.

8. In further response, Protective and the Empire Receiver hereby incorporate by reference their joint brief in opposition to Moody's petition for writ of certiorari.

9. The petition for writ of certiorari and the proposed brief of WLF in support thereof are frivolous. This Court should award respondents appropriate damages under Rule 49.

Respectfully submitted,

WILLIAM A. ROBINSON
(Attorney of Record)
Cabaniss, Johnston, Gardner,
Dumas & O'Neal
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Counsel for Respondent, Protective Life Insurance Company.

JAMES W. WEBB
Webb, Crumpton & McGregor
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Montgomery, Alabama 36101
(205) 834-3176

Counsel for Respondent, The Commissioner of Insurance of the State of Alabama, as Receiver for Empire Life Insurance Company of America.

Proof of Service

Proof of service of three copies of Respondents' Joint Response in Opposition to Motion of the Washington Legal Foundation for Leave to File a Brief *Amicus Curiae*, upon all parties separately represented by counsel, was filed by William A. Robinson, a member of the bar of the United States Supreme Court, with the clerk of the United States Supreme Court on the same date the joint response in opposition was filed.

APPENDIX

APPENDIX A

CIRCUIT COURT, TENTH JUDICIAL
CIRCUIT OF ALABAMA
EQUITY DIVISION

CIVIL ACTION NO. 171-687

State of Alabama
Ex Rel John G. Bookout
Commissioner of Insurance
Plaintiff

vs.

Empire Life Insurance
Company of America, An
Alabama Corporation
Defendant

and

Shearn Moody, Jr.
Intervenor

DECREE AUTHORIZING RECEIVER TO ACCEPT PROPOSAL FOR REINSURANCE AND TO PROCEED WITH LIQUIDATION

This case came on for hearing on the Receiver's petition to reinsure the business of Empire Life Insurance Company of America, an Alabama corporation, and liquidate its assets and on related pleadings. Voluminous documentary evidence and oral testimony were presented to the Court at a ten-day hearing on the petition. On the basis of the evidence adduced at that hearing, the Court finds and concludes as follows:

1. Empire is, and at all times since the filing of this delinquency proceeding has been, both impaired and insolvent. At the time of the hearing, Empire was impaired in excess of $10,000,000 and insolvent in excess of $6,000,000.

2. John G. Bookout, Commissioner of Insurance, State of Alabama, has duly determined that further efforts to rehabilitate Empire would be useless, and on the basis of the evidence, the Court agrees with said determination.

3. It is in the best interest of the policyholders of Empire for Empire's business in force to be reinsured by a reputable and solvent insurance company and for its assets to be liquidated; the interests of said policyholders cannot be reasonably secured and protected in the absence of such reinsurance.

4. Neither the Intervenor, Shearn Moody, Jr., nor any other stockholder has submitted any plan of rehabilitation which would not present substantial and undue risk to the policyholders.

5. Protective Life Insurance Company, an Alabama corporation established in 1907, has a combined capital and surplus in excess of $25,000,000. Protective is a party to this action as an Intervenor. The Protective proposal has been recommended and endorsed by the Alabama Commissioner of Insurance and the commissioners of all other states centrally concerned with the affairs of Empire. Of the proposals for reinsurance submitted in response to the Receiver's solicitation, that of Protective, as amended, best protects the interests of Empire's policyholders. The Protective proposal, as amended, is fair, reasonable, non-discriminatory, responsive to the solicitation authorized by the Court, and fully in accordance with all applicable law.

6. Contrary to the claim of Moody, there is no evidence of any wrongful or improper action or conspiracy on the part of Protective or any of its officers or agents in connection with the

Protective proposal, in connection with recommendation of the proposal to the Court by the Receiver, by any other commissioner or by any witness, or in connection with any other aspect of this proceeding.

7. Moody also contends that the Receiver mismanaged Empire's affairs during the period of the receivership. This claim must be rejected. The Court finds that the Receiver in no respect mismanaged Empire's affairs or contributed detrimentally to its present condition, but rather the Receiver faithfully performed his duties in accordance with Alabama law and the orders of this Court.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

ONE: That the Receiver be and hereby is authorized and directed to accept and execute the Protective proposal as amended so that it shall become a binding contract, and to perform each and all of his covenants thereunder.

TWO: That the Receiver proceed with the orderly liquidation of the affairs of Empire.

THREE: That the Receiver proceed under this order subject to further review and order by and of this Court.

DONE and ORDERED this 14th day of June, 1974.

Wm. C. Barber

Circuit Judge In Equity Sitting

APPENDIX B

Excerpt From Amended Complaint

* * *

WHEREFORE, Plaintiff demands judgment on behalf of himself, and the class he represents as follows:

I. That this court certify this action as a class action on behalf of all persons who presently hold or own Empire Special Executive plan life insurance policies.

II. That this court convene a statutory court of three judges pursuant to Title 28 U.S.C. Section 2284 for the purpose of hearing and determining the cause.

III. That this court adjuge and declare Section 623 and Section 631 of Title 28A of the Code of Alabama in violation of the Constitution of the United States.

IV. That this court issue a temporary and permanent injunction: 1) restraining and preventing defendants, their agents, servants and employees, and all other persons who receive actual notice of the order of this court from enforcing, executing, administering, or in any other manner giving effect to the provisions of Section 623 and Section 631 of Title 28A of the Code of Alabama, 2) restraining and preventing defendants, their agents, servants and employees, and all other persons who receive actual notice of the order of this court from liquidating Empire and from enforcing the Treaty of Assumption and Bulk Reinsurance between Bookout and Protective, from taking any further steps to consummate said Treaty of Assumption and Bulk Reinsurance, and from enforcing or carrying out any order, judgment, or decree entered in the circuit for the 10th Judicial Circuit of Alabama in Case No. 171-687 captioned *Alabama ex rel Bookout* v. *Empire.*

V. That this court declare that any action taken in the aforementioned case captioned *Alabama ex rel Bookout* v. *Em-*

pire is null and void, and that no party to this proceeding or anyone else getting actual notice of the order of this court proceed with an insolvency proceeding against Empire unless every policyholder of Empire be given personal notice or notice by mail of said proceeding.

VI. In the alternative to injunctive relief, that this court enter a judgment against defendants, and each of them, jointly and severally, in the sum of $40,000,000.00, said sum being intended to be the total value of the assets which the defendants are about to wrongfully transfer from Empire to Protective.

VII. That this court grant plaintiff's attorneys' fees, and such other, further, and different relief as is just, together with the costs and disbursements of this action.

Dated: Birmingham, Alabama
January 27, 1975.

Collins and Johnston
1401 City Federal Building
Birmingham, Alabama 35203

Dale R. Major
3217 Montrose
Houston, Texas 77002

Saxe, Bacon, Bolan & Manley
39 East 68th Street
New York, New York 10021

By: /s/ Scott E. Manley

Affidavit of Service

State of Texas

SS:

County of Galveston

SCOTT E. MANLEY, being duly sworn, deposes and says:

I hereby certify that I am one of the Attorneys of Record for the Plaintiff and that I have this date served a copy of the above and foregoing Amended Complaint on James W. Webb and Edwin K. Livingston, Attorneys of Record for Defendant John G. Bookout, Individually and as Receiver of Empire Life Insurance Company of America, and on Drayton Nabers, Jr. and Cabaniss, Johnston, Gardner & Clark, Attorneys of Record for Defendant Protective Life Insurance Company, by placing a copy of same in the United States mail, postage prepaid at their respective office addresses:

James W. Webb, Esq., 138 Adams Avenue, Montgomery, Alabama 36104;

Edwin K. Livingston, Esq., 30 South Perry Street, Montgomery, Alabama 36104;

Drayton Nabers, Jr., Esq., Cabaniss, Johnston, Gardner & Clark, Flirst National-Southern Natural Bldg., Birmingham, Alabama 35203.

Done this 28th day of January, 1975.

/s/ Scott E. Manley
Saxe, Bacon, Bolan & Manley
39 East 68th Street
New York, New York 10021
BY: Scott E. Manley

Sworn to before me this
28th day of January, 1975.
Wilma Hindry

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 74-377-N

Willie Allmon,
Plaintiff,

v.

John G. Bookout; *et al.*,
Defendants.

SUMMARY JUDGMENT

In accordance with the memorandum opinion entered by this Court in this case on April 24, 1975, it is the

ORDER, JUDGMENT and DECREE of this Court that summary judgment be, and the same is hereby, entered for the Defendants in the above-styled cause; that the Plaintiff take nothing by this suit; and that the costs of this proceeding be taxed against the Plaintiff and Intervening Plaintiff.

DONE this 24th day of April, 1975.

R. E. Varner
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
Civil Action No. 74-377-N

Willie Allmon,
Plaintiff,

v.

John G. Bookout, *et al.*,
Defendants.

MEMORANDUM OPINION

This cause is now before the Court on the various Defendants' motions to dismiss and motions for summary judgment. It is the opinion of this Court that this case does not warrant the empaneling of a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. Accordingly, the Plaintiff's request for such is hereby denied. It is further ORDERED that the motion of John S. Bleker, Jr., for intervention filed herein February 10, 1975, be, and the same is hereby, granted.

The threshold issue which these motions place before the Court deals with this Court's jurisdiction to entertain this suit.

The pleadings in this case in which the named Plaintiff is a stockholder of an insurance company that has been declared in receivership by the Circuit Court of Jefferson County, Alabama, pursuant to Code of Alabama, Title 28A, §§ 620-655, indicate that *inter alia* jurisdiction is based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).[1] The Defendants herein have stressed

---

[1] There is some question as to jurisdiction herein based on the lack of the requisite jurisdictional amount as is required by 28 U.S.C. §§ 1331 and 1332. In view of the Court's finding with regard to 28 U.S.C. § 1343(3), it is unnecessary to reach this point.

the point that no jurisdiction exists in this case because of the absence of the requisite jurisdictional amount. The Plaintiff, on the other hand, insists that he has stated a cause of action under § 1343(3) since no jurisdictional amount is required under that section.

Basically, 28 U.S.C. § 1343(3) is the jurisdictional counterpart to 42 U.S.C. § 1983. While the language in subsection (3) of § 1343 refers to "equal rights",[2] such language is apparently not meant to limit the subsection's scope to equal protection claims alone.[3] Indeed, the courts have uniformly held that no jurisdictional amount is required when jurisdiction of a due process claim, as herein, is founded on § 1343(3). *Douglas* v. *City of Jeannette,* 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); *Lynch* v. *Household Finance Corp., supra; Gibson* v. *Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973); *Walton* v. *City of Atlanta,* 181 F.2d 693 (5th Cir. 1950), *cert. den.* 340 U.S. 823 (1950); *Doe* v. *Lukhard,* 363 F.Supp. 823 (ED Va. 1973), *affm'd.* 493 F.2d 54 (4th Cir. 1974).

The plaintiff having complied with the technical requirements of jurisdiction, it becomes incumbent upon this Court to look beyond these technicalities to the practicalities and effects of the maintenance of this suit in which the jurisdiction sought to be invoked is substantially the same as that previously vested and presently existing in the Alabama State Court.

---

[2]Section 1343(3) states as follows: "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for *equal rights* of citizens or of all persons within the jurisdiction of the United States." (emphasis added)

[3] *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), indicates that this language is merely a remnant of a previously abolished statute and has never been construed to so limit § 1343(3). See footnote 7, 405 U.S. at 543.

The jurisdiction vested in the Alabama State Court undeniably authorizes that Court to direct the disposition and distribution of receivership property, control of which is essential in order to effectuate the exercise of the State Court's jurisdiction. Plaintiff seeks, through charges of bias, impropriety, and the State receivership statute's unconstitutionality[4], to enjoin the disposition of the receivership's property and to secure an award of a sum of money based solely on the value of the assets of the receivership estate. Effectively what the Plaintiff would have this Court do would be to assert omnipotent power and to wrest control of the receivership estate from a State Court of competent jurisdiction, thereby materially disrupting if not destroying the orderly function and execution of the State Court and its procedures.

Considerations of comity—the policy of a federal court to avoid friction with a State Court in the administration of justice—and federalism lead this Court to believe that it should not interfere with the orderly function of the State Court.[5] To do otherwise would be to give at the least the appearance of an unseemly and disastrous conflict between the two systems.

It appears to be the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation that the Court first assuming jurisdiction may maintain and continue to exercise that jurisdiction to the exclusion of any other court. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U.S. 189, 195, 75 L.Ed. 850, 855 (1935). See also *Princess Lida of Thurn & Taxis* v. *Thompson,* 305 U.S. 456, 83 L.Ed.

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[4] A three-judge court pursuant to 28 U.S.C. § 2281 has been requested on the issue of whether or not the statute is unconstitutional. However, it does not appear that such a three-judge court is necessary or called for in this cause.

[5] Though the Court does not address itself to the issues of abstention (28 U.S.C. § 2283), these issues do appear relevant and would possibly further substantiate the Court's decision.

285 (1939); *Gillis* v. *Keystone Mutual Casualty Co.*, 172 F.2d 826 (6th Cir.), *cert.den.* 338 U.S. 822, 94 L.Ed. 499 (1949); *Jacobs* v. *DeShetter*, 465 F.2d 840 (6th Cir. 1972).

This jurisdictional priority principle is buttressed by the case of *Hutchins* v. *Pacific Mutual Life Ins. Co.*, 20 F.Supp. 150 (S.D. Cal. 1937), *affm'd.* 97 F.2d 58 (9th Cir. 1938). In that case prior to any suit being filed in federal court, the State Court vested title of all the assets of an alleged insolvent domestic insurance company in the Insurance Commissioner of California pursuant to his petition. After the State Court—again pursuant to the Commissioner's petition—approved liquidation of the insolvent company on the grounds that conservation was futile, the Commissioner filed a plan of reorganization whereby a new insurance company was to acquire the assets of the insolvent company. The plan, after approval by the State Court, was fully executed.

Subsequently, suit was brought in federal court seeking reconveyance of the assets on the grounds that the entire State proceeding was fraudulent and, therefore, that the State Court lacked jurisdiction. The District Court, in dismissing the federal action, stated:

> "This action, and the one in the state courts, are actions in rem, or, at least, quasi in rem. The relief sought is primarily concerned with the assets in question. The rule in such cases is that the court first acquiring jurisdiction of the res has exclusive jurisdiction." 20 F.Supp. at 152.

See also *Leggett* v. *Green*, 188 F.2d 817 (8th Cir. 1951).

A final point to be noted in this regard is that, if the State procedure is followed to the State Supreme Court, the federal court will ultimately be able to review the federal questions thus preserved. In such situations, the federal court should decline to invoke its jurisdiction out of a sound respect for the in-

dependence and integrity of State action. *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 332-34, 87 L.Ed. 1424, 1434-35 (1943).

In view of the foregoing, this Court is of the opinion that the great confusion and disillusionment in and with the judicial system that would be likely to arise where two separate courts claim and exercise jurisdiction over substantially the same parties, the same series of transactions, the same property, and the same rights warrant one court surrendering to the other. Thus, in keeping with the jurisdictional priority principle, it seems appropriate, as a matter of law,[6] for this Court to decline to hear this cause and for summary judgment in accordance with Rule 56, Federal Rules of Civil Procedure to issue on behalf of the Defendants.

DONE this 24th day of April, 1975.

R. E. Varner
UNITED STATES DISTRICT JUDGE

---

[6]As to matters material to the question of comity, there is no material issue of fact for the Court to determine.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 74-377-N

Willie Allmon, *et al.*,
Plaintiff,

v.

John G. Bookout; *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Plaintiff hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Summary Judgment in favor of the Defendants entered in this action on the 24th day of April, 1975.

Jones, Murray, Stewart &
Yarbrough
By: Coleman Yarbrough
P. O. Box 429
Montgomery, Alabama 36101
Attorneys for Plaintiff

OF COUNSEL:
Mr. Scott E. Manley
Mr. M. Paul Solomon

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on Mr. James W. Webb, 138 Adams Avenue, Montgomery, Alabama, 36104, and Mr. Edwin K. Livingston, 32 South Perry Street, Montgomery, Alabama, 36104, Attorneys for Defendants John Bookout, individually, and Charles Payne as Commissioner of Insurance; Mr. Drayton Nabers and Mr. William A. Robinson, Cabaniss, Johnston, Gardner, Dumas & O'Neal, 19th Floor First National Southern Natural Building, Birmingham, Alabama, 35203, Attorneys for Defendants Protective Life Insurance Company, William J. Rushton, III, Thomas K. Pennington, and Ryburn H. Bailey; Charles H. Hunter, pro se, 335 Dexter Avenue, Montgomery, Alabama; Mr. E. R. Alley and Mr. Lampkin Butts, P. O. Box 2744, Laurel, Mississippi, 39440, Attorneys for Defendant Richard M. Goode; Mr. Sidney Lavendar and Mr. Gilbert E. Johnston, of the firm of Johnston, Barton, Proctor, Swedlaw and Naff, Twelfth Floor, Bank for Savings Building, Birmingham, Alabama, 35203, Attorneys for Defendant Paul E. Carr, by mailing a copy of same, through the United States mail, postage prepaid, to their respective offices on this the 24th day of April, 1975.

Coleman Yarbrough
Attorneys for Plaintiff

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2104

Willie Allmon, On behalf of himself and all other persons who presently hold or own Empire Special Executive Plan insurance policies issued by Empire Life Insurance Company of America,

Plaintiffs-Appellants,

John S. Bleker, Jr.,

Plaintiff-Intervenor,

vs.

John G. Bookout, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Alabama

---

Before Coleman, Ainsworth and Simpson, Circuit Judges.

BY THE COURT: -

IT IS ORDERED that appellant's motion to expedite appeal is DENIED.

IT IS FURTHER ORDERED that appellant's motion for protective order and motion for injunction pending expedited appeal is DENIED.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2104

Willie Allmon, on behalf of himself and all other persons who presently hold or own Empire Special Executive Plan insurance policies issued by Empire Life Insurance Company of America,

Plaintiff-Appellant,

John S. Bleker, Jr.,

Plaintiff-Intervenor,

vs.

John G. Bookout, *et al.*,

Defendants-Appellees.

MOTION TO DISMISS APPEAL

Come now Protective Life Insurance Company ("Protective"), William J. Rushton, III, Thomas K. Pennington, and Ryburn H. Bailey, appellees in the above cause, and move the Court to dismiss the appeal taken by appellant, Willie Allmon, and as grounds for said motion respectfully show to the Court as follows:

1. The appellant in this cause, Willie Allmon, plaintiff below, appeals from an order entered in C.A. No. 74-377N by District Judge Varner, United States District Court for the Middle District of Alabama, granting summary judgment in appellees' favor. An appeal to this Court was also taken by John S. Bleker, Jr., who was permitted to intervene as a plaintiff by the district court. Bleker's appeal (No. 75-8245), however, was duly

dismissed by this Court on June 24, 1975 pursuant to Fifth Circuit Rule 9(b)(2) for failure to timely docket said appeal. Thus, Allmon's appeal (No. 75-2104) is the sole appeal before this Court from the district court's entry of summary judgment.

2. It affirmatively appears on the face of the complaint as originally filed and as amended that the suit upon which this appeal is based was filed in the name of Willie Allmon, solely in Allmon's capacity as a policyholder of Empire Life Insurance Company of America ("Empire"). [Cmplt. at 1; Amended Cmplt. at 2]. True and correct copies of the original complaint and the amended complaint are attached hereto as Exhibits "1" and "2", respectively. Apart from his status as holder of Empire Special Executive Plan Policy No. 30136 ["ESEP No. 30136"], Allmon has asserted no claim whatsoever against the above-named defendants-appellees, or any of the appellees for that matter.

3. As more particularly appears from the Affidavits of Clarence Melvin Duckett, attached hereto as Exhibits "3" and "3-A", filed in support of this motion, events that occurred subsequent to the entry of the judgment on which the instant appeal is based, render Allmon's appeal moot. The events that mandate the dismissal of this appeal on the grounds of mootness are summarized below and are fully supported by the Duckett affidavit and the exhibits thereto.

(a) By letter dated May 13, 1975, Allmon demanded payment of the cash values of ESEP NO. 30136.

(b) On or about June 5, 1975, pursuant to Allmon's request, Allmon was sent the applicable cash-surrender form and instructed to execute said form if he so desired and to return it with his policy, in order to effect surrender of the policy for its cash values. At this time, Allmon was also advised of the relative disadvantages attendant upon his election to surrender his policy as opposed to his exercising other available options.

(c) On or about August 18, 1975, Allmon was sent further instructions as to the proper method of effecting surrender of his policy.

(d) On or about August 25, 1975, Willie Allmon, and all other persons having an interest in ESEP No. 30136, executed a "Policy Surrender Release Agreement," by the express terms of which Allmon formally elected to claim the cash-surrender value of his policy and surrendered said policy for cancellation and termination. The election to claim the cash-surrender value of the ESEP No. 30136 was asserted by Allmon "in exchange for and in full settlement and in lieu of any and all other rights and benefits of the policy."

(e) Upon receipt of the executed Policy Surrender Release Agreement by Protective on August 27, 1975, ESEP No. 30136 was stamped "CASH SURRENDERED" and Protective's check no. 01297, in full payment of the cash surrender value of said policy ($959.26), was issued payable to Willie Allmon, Sr. As a result of the foregoing, the policy of insurance held by Allmon was in all respects cancelled and the insurance coverage thereunder was terminated.

(f) Shortly after check no. 01297 was issued by Protective in full payment of the cash surrender value of the ESEP No. 30136, William Allmon negotiated said check and, on October 8, 1975, Protective received cancelled check no. 01297 from the Mercantile National Bank at Dallas, the Texas bank on which said check was drawn.

4. As more particularly appears from the affidavit of Thomas K. Pennington, attached hereto as Exhibit "4" and filed in support of his motion, the sum received by Willie Allmon in full payment of the cash surrender value of ESEP No. 30136 ($959.26) represents the total amount due Allmon under the terms of his policy. The amount of said payment was not reduced (or adversely affected in any way whatever) by reason of the reinsurance of the insurance business of Empire by Protective.

5. Based on the occurrence of the foregoing events, it is indisputably clear that Willie Allmon has no legally cognizable interest in the outcome of this appeal because Allmon has voluntarily terminated his status as an Empire policyholder and no longer claims any interest whatever in ESEP No. 30136.

WHEREFORE, appellees, Protective Life Insurance Company, William J. Rushton, III, Thomas K. Pennington, and Ryburn H. Bailey, respectfully move the Court to dismiss the appeal taken by Willie Allmon on the grounds that disposition of said appeal cannot affect any rights of Willie Allmon, and said appeal seeks a mere advisory ruling from this Court that the District Court below erred in entering summary judgment in appellees' favor.

Respectfully submitted,

Drayton Nabers, Jr.

William A. Robinson

Attorneys for Protective Life Insurance Company, William J. Rushton, III, Thomas K. Pennington, and Ryburn H. Bailey.

Of Counsel:

Cabaniss, Johnston, Gardner,
Dumas & O'Neal
1900 First National-Southern
Natural Building
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Dismiss Appeal and supporting papers have been served upon the following, by first class, United States Mail, postage prepaid and properly addressed as follows: James W. Webb, 138 Adams Avenue, Montgomery, Alabama 36104; Edwin K. Livingston, 32 South Perry Street, Montgomery, Alabama 36104; E. R. Alley and Lampkin Butts, P.O. Box 2744 Laurel, Mississippi 39440; Edward Still, 321 Frank Nelson Building, Birmingham, Alabama 35203; Gilbert E. Johnston and Sydney Lavender, Johnston, Barton, Proctor, Swedlaw and Naff, Bank for Savings Building, Birmingham, Alabama 35203.

Dated this 9th day of October, 1975.

William A. Robinson
Of Counsel

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2104

William Allmon, On behalf of himself and all other persons who presently hold or own Empire Special Executive Plan insurance policies issued by Empire Life Insurance Company of America,

Plaintiffs-Appellants,

John S. Bleker, Jr.,

Plaintiff-Intervenor,

vs.

John G. Bookout, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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Before Coleman, Ainsworth, and Simpson, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal is DENIED without prejudice, the appeal is vacated, and the cause is remanded to the District Court for appropriate findings of fact and conclusions of law, after an adversary hearing, as to whether the present appeal has been mooted.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 74-377-N

Willie Allmon, Etc.,
Plaintiff,

vs.

John G. Bookout, Individually, *et al,*
Defendnats.

ORDER

There is now presented the Plaintiff's motion for protective order filed herein December 18, 1975. The Plaintiff is seeking to have the Court enter a protective order forbidding all parties before this Court and forbidding the Circuit Court of Jefferson County, Alabama, from taking any action to restrict the participation by any attorneys retained by Plaintiff in the present litigation; to prohibit any interference, direct or indirect, including requiring any attorney representing Allmon to cease representing any other client or requiring any client of said attorneys to cease employment of such attorneys or be subject to a penalty.

In effect, the Plaintiff is seeking "protection" from an order issued by Judge Barber, Circuit Court Judge for Jefferson County, on January 6, 1975. This order and injunction was entered in the State Court receivership proceedings relating to Empire Life Insurance Company. The major part of the order reads as follows:

"It is ORDERED, ADJUDGED and DECREED that

"(1) any and all policyholder, stockholders and agents, present or former, of Empire Life Insurance Company of America, and

"(2) Shearn Moody, Jr., his officers, agents, servants, employees and attorneys (including, but without limitation, Donald L. Collins, A. Eric Johnston, Dale R. Major, Scott E. Manley, A. R. Schwartz, and Thomas R. Beach), and those persons in active concert or participation with any of the foregoing be permanently restrained and enjoined from filing, financing, sponsoring, initiating, or aiding, in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court wheresoever located on behalf of any party whatsoever against:

"(1) John G. Bookout, as an individual;

"(2) John G. Bookout as Receiver of Empire Life Insurance Company of America, his officers, agents, employees and attorneys;

"(3) the Ancillary Receivers of Empire Life Insurance Company of America, their officers, agents, employees and attorneys;

"(4) Protective Life Insurance Company, its officers, agents, employees and attorneys; or

"(5) any other person or legal entity which lawsuit or claim relates to or affects directly or indirectly:

"(a) the affairs of Empire Life Insurance Company of America;

"(b) its receivership;

"(c) its Receiver;

"(d) the Treaty of Assumption and Bulk Reinsurance, as amended, between the Receiver and Protective Life Insurance Company; or

"(e) the implementation of any order or decree of this Court in this proceeding, unless such policyholders, stockholders or agents or said Shearn Moody, Jr., his officers, agents, servants, employees and attorneys and those persons in active concert or participation with them shall first receive the prior approval of this Court."

After a pleading was filed in the present case, Judge Barber issued an order on April 30, 1975, holding Shearn Moody in contempt for violating the injunction. The order provided that Moody could purge himself of contempt by, *inter alia,* discharging any and all attorneys presently employed, directly or indirectly, by or on behalf of Moody, whose employment is or has in any way related to the filing in the present action. The penalty for failing to purge himself of contempt was $5,000.00 per day fine. Those attorneys representing both Allmon and Moody chose to withdraw from the case in this Court.

Although Plaintiff's motion is seeking a "protective order", the Court is unaware of any effective relief, other than injunctive relief, that would be applicable in this particular situation.

After the present case was remanded by the Fifth Circuit Court of Appeals for a determination of whether Plaintiff's claim is now moot, Judge Barber modified the original injunction by entering an order on December 16, 1975, which stated that no action will be taken to interfere with Willie Allmon's active and full participation in the proceedings on the mootness question. Thus, it is clear that Allmon is no longer being restrained from proceeding in this Court. The question that remains is whether it would be proper for this Court to enjoin a State Court injunction and contempt order that have restricted the participation of a number of attorneys retained by Willie Allmon in the present action. It should be pointed out that the

Alabama Supreme Court has recently held that Judge Barber's injunction was properly issued pursuant to Title 28 A, § 624(2), Code of Alabama. That statute allows a receivership court to enjoin the commencement or prosecution of any actions that will unduly interfere with the receivership proceedings pending in that court. *Shearn Moody* v. *State of Alabama,* S.C. 1269, February 27, 1976.

Defendants contend, *inter alia,* that this Court is prevented from interfering with State Court proceedings by the so-called Anti-Injunction Statute, 28 U.S.C. § 2283:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by an Act of Congress, or where necessary in the aid of its jurisdiction, or to protect or effectuate its judgments."

Plaintiff's position is that § 2283 is non-jurisdictional and no more than a statutory enactment of the principle of comity between State and federal courts[1] and that this principle should give way in extraordinary cases when it is necessary to vindicate clear First Amendment rights. *Machesky* v. *Bizzell,* 414 F.2d 283 (5th Cir. 1969). Furthermore, Plaintiff argues that the present action was brought under 42 U.S.C. § 1983 and that it is well established that an action brought under § 1983 is included within the specific exception to § 2283 as an expressly authorized Act of Congress, *Mitchum* v. *Foster,* 407 U.S. 225 (1972). This Court agress that § 2283 does not absolutely bar the issuance of an injunction in the context of the present case. In recognizing that the anti-injunction statute is not an absolute bar to the is-

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[1] This Court does not accept the broad statement that 28 U.S.C. 2283 is a mere principle of comity. See *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286-287 (1970); *International Association of Machinists & Aerospace Workers* v. *Nix,* 512 F.2d 125, 129 (5th Cir. 1975).

suance of an injunction in a § 1983 case, the Supreme Court in *Mitchum* v. *Foster, supra,* noted that the traditional principles of equity, comity and federalism should still be strongly considered in such a case.

Let us now assume, *arguendo,* that the Plaintiff has met the procedural prerequisites for the relief sought.[2] The question now becomes whether the present situation warrants the drastic action sought by the Plaintiff. In the interest of the principles of equity, comity and federalism, this Court recognizes that a State Court should be enjoined only in the most extraordinary circumstances. *Machesky* v. *Bizzell, supra.* The anti-injunction statute is to be ignored only in the face of the most compelling reasons, instances where grave and irreparable injury must be avoided. *Baines* v. *City of Danville,* 337 F.2d 579 (4th Cir. 1964), *cert. den.* 381 U.S. 939. It is the opinion of this Court that such extraordinary circumstances do not exist here. The Plaintiff has argued that the right to free access to the federal tribunals is "one of the highest and most essential privileges of citizenship." *Chambers* v. *Baltimore & Ohio Railroad Co.,* 207 U.S. 142, 148 (1907). However, it is important to remember that the Plaintiff himself is no longer precluded from pursuing his action in federal court. Willie Allmon has free access to this Court, and it is the intention of the Court to preserve this right.

Plaintiff contends that the State Court order gravely impairs the effective prosecution of his case. Plaintiff's present attorney of record, Mr. Edward Still, has stated to this Court that he was

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[2] As previously stated, it is apparent that the only appropriate relief is injunctive relief. Plaintiff has raised the point that the requirements of Rule 65, Federal Rules of Civil Procedure, have not been met, and, thus, an injunction may not issue. The Court feels that it should reach the merits of the issue raised by the present motion and openly decide a question that has impeded the progress of this case.

retained for the purpose of representing Allmon on appeal and is, therefore, unfamiliar with the intricacies of the proceedings at this level. It is true that this case and related actions are fairly complicated; however, the sole issue presently before this Court is whether Willie Allmon's claim has become moot. The question of mootness arose after Mr. Still's entrance into the case. In view of the fact that this is the sole issue to be litigated in this forum, there is no reason to believe that the Plaintiff will not be amply represented or that Mr. Still is operating under any disadvantage.

Plaintiff has cited the case of *Donovan* v. *City of Dallas,* 377 U.S. 408 (1964), as being supportive of his position. In that case, a group of Dallas citizens sought to restrain the city from building an additional runway at the municipal airport and from selling municipal bonds for that purpose. The suit was filed in Texas State Court and summary judgment was granted for the city. The Texas Supreme Court denied review. Subsequently, a larger group, including some of the plaintiffs in the State Court case, filed an action in federal district court seeking relief against the City of Dallas and a number of new defendants. Under Texas law, the bonds could not be issued as long as their validity was being challenged in the Courts. After the suit was filed in federal court, the city sought a writ of prohibition to bar the plaintiffs from prosecuting the action in federal court. The Texas Supreme Court ruled that such a writ should be issued, and the lower court promptly entered an order enjoining the plaintiffs in the federal court case, individually and as a class, from filing or instituting any further litigation relating to this matter. The action was then dismissed in federal district court, and an appeal was filed in the Fifth Circuit Court of Appeals. The plaintiffs were then held in contempt of the State Court injunction. The United States Supreme Court held "that state courts are completely without power to restrain federal court proceedings in *in personam* actions ***." (At 377 U.S. 413).

Although in some ways the *Donovan* case is factually analogous to the present situation, it is inapposite for two reasons. First and foremost, in *Donovan* the plaintiffs themselves were enjoined from prosecuting their case in federal court, while in the present case Allmon is no longer denied access to federal court. Secondly, this Court has previously decided that a receivership action in State Court involving an insolvent insurance company is an action *in rem,* or at least *quasi in rem,* and, therefore, under the jurisdictional priority rule, the court first assuming jurisdiction (in this case, the State Court) may maintain and continue to exercise that jurisdiction to the exclusion of any other court. See Memorandum Opinion entered in this cause on April 24, 1975. In *Donovan,* the Supreme Court stated:

> "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. This rule has remained substantially unchanged to this time. An exception has been made in cases where a court has custody of property, this is, proceedings *in rem* or *quasi in rem.* In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida* v. *Thompson,* 305 U.S. 456, 465-568." At 377 U.S. 412.

Thus, it is clear that *Donovan* is not applicable to the present case.

In concluding that § 1983 is an Act of Congress that falls within one of the exceptions of the anti-injunction statute, the Supreme Court stated in *Mitchum* v. *Foster, supra:*

> "*** (W)e do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin state court proceedings. *** They are principles that have been emphasized by [the Supreme] Court many times in the past. *Fenner* v.

Boykin, 271 U.S. 240; *Spielman Motor Sales Co.,* v. *Dodge,* 295 U.S. 89; *Beal* v. *Missouri Pac. R. Co.,* 312 U.S. 45; *Watson* v. *Buck,* 313 U.S. 387; *Willias* v. *Miller,* 317 U.S. 599; *Douglas* v. *City of Jeannette,* 319 U.S. 157; *Stefanelli* v. *Minard,* 342 U.S. 117; *Cameron* v. *Johnson,* 390 U.S. 611." At 407 U.S. 225.

This situation, as it presently exists, does not warrant the Court's intrusion into the orderly function of the State Court. Consideration of comity and federalism compel this Court to deny Plaintiff's motion for protective order. Accordingly, it is

ORDERED by this Court that said motion for protective order be, and the same is hereby, denied.

DONE this 24th day of March, 1976.

R. E. Varner
United States District Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 74-377-N

Willie Allmon, Etc.,
Plaintiff,

vs.

John G. Bookout, Etc.; *et al,*
Defendants.

JUDGMENT

Pursuant to the Memorandum Opinion entered by this Court in the above-styled cause on the 28th day of June, 1976, it is

ORDERED, ADJUDGED and DECREED by this Court that the above-styled cause be, and the same is hereby, dismissed with costs of the proceeding on remand taxed against the Plaintiff, Willie Allmon, for which execution may issue.

DONE this 28th day of June, 1976.

R. E. Varner
United States District Judge

MEMORANDUM OPINION

Pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit, this cause came on for adversary hearing on May 14, 1976, on the question of whether this case has been mooted. This Court, having heard the testimony of witnesses and having considered all evidence submitted at said

hearing and the arguments of counsel, hereby finds the facts and states separately its conclusions of law thereon and directs the entry of the appropriate judgment as follows.

Findings of Fact

1. The complaint in this action was filed in the name of Willie Allmon, solely in Allmon's capacity as a policyholder of Empire Life Insurance Company of America (hereinafter "Empire").

2. Until late August, 1975, Allmon was the owner and primary beneficiary of Empire Special Executive Plan Policy No. 30136 (hereinafter "ESEP No. 30136" or "Allmon Policy").

3. Pursuant to the terms of a reinsurance plan (hereinafter called the "Protective Treaty"), approved by a State receivership court, Protective Life Insurance Company (hereinafter "Protective") assumed liability under ESEP No. 30136.

4. Allmon has received all benefits authorized by his policy which he has sought.

5. As of September 15, 1972, the Allmon policy had no withdrawable funds, i.e., said policy had a negative net cash value, as a result of loans sought and obtained by Allmon under the terms of ESEP No. 30136.

6. As Allmon had no withdrawable funds as of the effective date of the moratorium imposed by the Protective Treaty, the Protective Treaty works no injury or damage to Allmon.

7. ESEP No. 30136 provides, in pertinent part, that:

> "The policy may be surrendered for cash value in accordance with the Table of Values, less any indebtedness to the Company on this Policy."

8. On or about August 25, 1975, Willie Allmon and all other persons having interest in ESEP No. 30136 voluntarily executed

a policy surrender release agreement with respect to said policy and, thereby, exercised the foregoing contractual right to surrender ESEP No. 30136.

9. Allmon intentionally and voluntarily surrendered ESEP No. 30136, and the sequence of events that culminated in cancellation of said policy occurred without overreaching on the part of Protective or any other Defendant.

10. No misrepresentations were made by or on behalf of Protective in connection with the surrender of ESEP No. 30136, and there was no scheme to induce Allmon to surrender said policy.

11. The executed policy surrender release agreement and the original Allmon policy were submitted to Protective, and said policy was stamped "CASH SURRENDERED", and Protective's check No. 01297 in the amount of $959.26 was mailed to Willie Allmon.

12. Thereafter, Allmon promptly negotiated said check, and the check was subsequently paid by the drawee bank.

13. The sum received by Allmon in full payment of the cash surrender value of ESEP No. 30126 ($959.26) represents the total amount due Allmon under the terms of said policy. The amount of said payment was not adversely affected by the Protective Treaty, as amended.

Conclusions of Law

1. Allmon's election to claim the cash surrender value of ESEP No. 30136, in exchange for and in full settlement of all rights and benefits provided in the policy, worked a complete termination of Allmon's status as a policyholder and simultaneously mooted the controversy between Willie Allmon and the Defendants.

2. The class of former Empire policyholders which Willie Allmon purports to represent has not yet been certified, and in light of the fact that the controversy between Allmon and the Defendants has been mooted, this Court finds that it would be impossible for Willie Allmon to fairly and adequately protect the purported class since he is no longer a member of the class. Therefore, this prerequisite to a class action is not present. Rule 23(a)(4), Federal Rules of Civil Procedure. Accordingly, the mootness of this suit is unaffected by the class action allegations of the complaint, as amended.

Therefore, an order will be entered dismissing Plaintiff's action at his cost.

DONE this 28th day of June, 1976.

R. E. Varner
United States District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1235

SHEARN MOODY, JR.,

Petitioner,

THARPE FORRESSTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

SHEARN MOODY, JR.,

Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

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Febrary 20, 1981

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1235

SHEARN MOODY, JR.,

Petitioner,

v.

THARPE FORRESSTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

SHEARN MOODY, JR.,

Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation, Inc. hereby moves, pursuant to Supreme Court Rules 36 and 42, for leave to file the annexed brief *amicus curiae* in support of the petition for writ of certiorari in the above-captioned proceeding. Consent to the filing of this brief has been ob-

tained from counsel for petitioner; counsel for respondents has been contacted and has indicated that he objects.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae.* Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in the following cases: *Williams v. Zbaraz,* 100 S. Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York,* 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber,* 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers,* 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); *Federal Trade Commission v. Standard Oil Co. of California,* 49 U.S.L.W. 4054 (1980); *San Diego Gas and Electric Co. v. City of San Diego,* No. 79-678 (filed Aug. 22, 1980); *FCC v. WNCN Listeners Guild,* Nos. 79-824, 79-825, 79-826, 79-827, (U.S., filed Nov. 26, 1979); *Rostker v. Goldberg,* No. 80-251 (filed July 18, 1980).

WLF believes that it is in the public interest to assure that all citizens have meaningful access to federal and state courts to vindicate their rights. The Alabama in-

junction upheld by the Fifth Circuit would clearly violate the rule in *Donovan v. City of Dallas*, 377 U.S. 408 (1964). If left undisturbed, that opinion would set a dangerous precedent that significantly encroaches upon constitutionally-protected first amendment rights and the economic interests of persons protected by the fifth and fourteenth amendments.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist this Court in obtaining full consideration of all the public interest issues involved. Not only are petitioner's interests at stake, but that of Mr. Allmon, whose suit was assisted by Mr. Moody, as well as all other individuals, businesses, and corporations which have matters that are brought routinely before both federal and state courts.

Accordingly, the Washington Legal Foundation requests that it be permitted to participate as *amicus curiae* in this matter.

Respectfully submitted,

Daniel J. Popeo
General Counsel

Paul D. Kamenar
Director of Litigation

Daniel Bensing
Staff Attorney

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IN THE

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SHEARN MOODY, JR.,

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THARPE FORRESSTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

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PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

INTERESTS OF *AMICUS CURIAE*, WASHINGTON LEGAL FOUNDATION INC.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and

supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae.* Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in the following cases: *Williams v. Zbaraz,* 100 S. Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York,* 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber,* 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers,* 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); *Federal Trade Commission v. Standard Oil Co. of California,* 49 U.S.L.W. 4054 (1980); *San Diego Gas and Electric Co. v. City of San Diego,* No. 79-678 (filed Aug. 22, 1980); *FCC v. WNCN Listeners Guild,* Nos. 79-824, 79-825, 79-826, 79-827, (U.S., filed Nov. 26, 1979); *Rostker v. Goldberg,* No. 80-251 (filed July 18, 1980).

WLF believes that it is in the public interest to assure that all citizens have meaningful access to federal and state courts to vindicate their rights. The Alabama injunction upheld by the Fifth Circuit would clearly violate the rule in *Donovan v. City of Dallas.* If left undisturbed, that opinion would set a dangerous precedent that would significantly encroach upon constitutionally protected first amendment rights and the economic interests of persons protected by the fifth and fourteenth amendments.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may

assist this Court in obtaining full consideration of all the public interest issues involved. Not only are petitioner's interests at stake, but that of Mr. Allmon, whose suit was assisted by Mr. Moody, as well as all other individuals, businesses, and corporations which have matters that are brought routinely before both federal and state courts.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* hereby adopts by reference the statement of the case contained in the Petitioner's Brief for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Amicus submits that the decision of the Fifth Circuit Court of Appeals upholding the injunction of the Alabama Circuit Court is clearly wrong as a matter of law and public policy. The Fifth Circuit opinion conflicts with this Court's opinion in *Donovan v. City of Dallas,* 377 U.S. 408 (1964), as well as several other cases. The lower court opinion would permit a state court to enjoin proceedings in a federal court that are clearly in personam. If such injunctions are to be permitted, *amicus* submits that such wide deviations from the rule in *Donovan* should be given plenary examination by this Court.

Amicus further submits that the effect of the Fifth Circuit opinion would be to improperly infringe upon the First Amendment and property rights of not only petitioner, but of many other individuals, businesses, and corporations in this and other contexts.

ARGUMENT

I.

THE INJUNCTION ISSUED BY THE ALABAMA STATE COURT PROHIBITING PETITIONER FROM FILING OR AIDING ANY ACTION IN ANY COURT BROUGHT AGAINST THE ALABAMA RECEIVER IS IN VIOLATION OF THE DOCTRINE OF *DONOVAN v. CITY OF DALLAS*, 377 U.S. 408 (1964) AND THEREFORE IS INVALID.

A. It is well settled that where a state court has jurisdiction in an in rem proceeding, it may not enjoin an in personam action in federal court which, though it may relate to the state litigation, does not divest the state court of control or jurisdiction over the *res*.

An inevitable problem that arises with our federal system is the conflict of jurisdiction between federal and state courts. This Court over the years has carefully developed a body of law designed to resolve the constitutional questions inherent in the conflicts. The general rule is that federal and state courts cannot interfere with each other's proceedings. In *Donovan v. City of Dallas*, 377 U.S. 408 (1964), this Court stated:

> Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed.

Id. at 412.

This exception to the "no injunction" rule applies equally to both state and federal courts, although in other contexts, the federal courts have the greater power.[1] In no case, however, may a state court enjoin an in personam action brought in federal court notwithstanding that the issues raised therein relate to the in rem state court proceeding. *Id.* at 413. To rephrase the exception in a way that reaffirms the basic principle, "state courts are *completely* without power to restrain federal court proceedings in *in personam* actions." *Id.* (emphasis added). *See Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979); 1A, Pt 2 Moore's Federal Practice ¶0.222. The Court's phrase "completely without power" could not be clearer. The Fifth Circuit below not only mistakenly started its inquiry by focusing on the exception rather than the rule of *Donovan*, but it also misapplied the exception as well.

Attempts by state courts and lower federal courts to expand upon this narrow exception to the noninteference rule, have been met with disapproval from the Supreme Court. The *Donovan* doctrine, as judge-made law, has been and should be narrowly construed and as a matter of sound public policy, only the Supreme Court should be permitted to expand its scope.

For example, in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), the New Mexico Supreme Court had

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[1] The federal anti-injunction act, 28 U.S.C. §2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

attempted to broaden the *Donovan* exception by arrogating to itself the power to enjoin all suits in federal court which may be filed in the future by the party subject to the injunction. The New Mexico court wrongly assumed that *Donovan* only prohibited injunctions against pending litigation in federal courts, leaving the states free to enjoin suits yet to be filed. Commenting that the right to litigate in federal courts is granted by Congress, this Court was quick to strike down the injunction by the New Mexico Court. *Id.* at 17. Similarly, the Fifth Circuit Court of Appeals in this case should not be permitted to broaden, without this court's review, the scope of the *Donovan* exception by permitting an entire lawsuit to be enjoined which is clearly in personam, or arguably, contains mixed in personam and in tem issues.[2]

B. The federal proceeding in *Allmon v. Bookout* was in personam and thus could not be enjoined even though it sought injunctive relief against the Alabama receivership.

Prior to the issuance of the injunction by the Alabama Circuit Court on January 6, 1975, William Allmon, an Empire Life policy-holder, filed a lawsuit against the receiver in federal district court alleging impairment of the cash value of his policy. He later filed an amended

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[2] A second suggested exception to the general rule is that an injunction would lie in those situations where a party subject to the judgment of a state court initiates harassing and vexatious litigation in the federal court on the same issue. The dissent in *Donovan* was based on this exception. But even if this exception continues to have any vitality following the majority's opinion in *Donovan*, it would clearly not apply to the case at bar because there has never been any finding in the lower courts that Mr. Moody or Mr. Allmon engaged in any vexatious or harrassing litigation.

complaint, framing a class action, and alleging that conspiracy and corruption on the part of Alabama state officials violated the civil rights of all Empire Life policyholders. Petitioner, exercising what *amicus* submits are his constitutional rights of speech and association, assisted Allmon by providing him counsel.

Allmon's suit sought both injunctive relief restraining the receiver from taking certain actions alleged to be unconstitutional and also money damages from the receiver for past injuries. *Amicus* submits that even if the injunctive relief were properly construed as a disguised in rem action, the clearly in personam money claim could not be disturbed by the state court.

The logic of the *Donovan* exception, permitting a state court to enjoin a federal action, applies only where the federal action is *exclusively* an in rem action that would interfere directly with the state court's jurisdiction over the *res*. For instance in *Blackhawk Heating & Plumbing Company Inc. v. Geeslin,* 530 F.2d 154 (7th Cir. 1976) the Seventh Circuit ordered a federal in rem action dismissed since a state proceeding had already established jurisdiction over the *res* in an earlier in rem action. The federal court could only grant plaintiff's relief by destroying the state court's previously-established jurisdiction over the property; this it was precluded from doing by the *Donovan* doctrine.

Conversely, an in personam action filed in federal court which would establish a claim on the funds held in a state court in rem proceeding, may never be enjoined. Such an action, while it might *affect* the state court proceeding, would not *destroy* the state court's jurisdiction over the *res* and therefore may not be enjoined. *Mills v. Roanoke Industrial Loan and Thrift,* 70 F.R.D. 448 (W.D. Va. 1975); *Slotkin v. Brookdale Hospital Center,*

357 F. Supp. 705 (S.D.N.Y. 1972). Logically therefore, where in personam relief (e.g. money damages or a declaratory judgment) is sought in a proceeding which also seeks to challenge the state court jurisdiction over an in rem suit, an injunction barring this entire action is not justified. Federal courts which have confronted such suits have not ordered dismissal for lack of jurisdiction, but rather have chosen to adjudicate the in personam issues raised while dismissing the in rem aspects of the suit.

For example, in *Purcell v. Summers,* 126 F.2d 390 (4th Cir. 1942), *cert. denied,* 317 U.S. 640 (1942), a lawsuit was brought by certain bishops of the Methodist Church seeking a declaratory judgment as to the effects of a union between the northern and southern branches of that church and a determination of property rights of the various branches. The suit was originally dismissed by the District Court because when it was filed, eight separate state court suits were pending to determine the same property issues brought before the federal court. The Fourth Circuit nevertheless reversed in part, holding that the federal court did have jurisdiction to grant the declaratory judgment sought by plaintiffs:

> . . . where the jurisdiction of a state court has first attached to property, a federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction. (citations omitted). This does not mean, however, that the federal court is without power to render a judgment between the same parties with respect to other matters; and it is no objection to such exercise of jurisdiction that it may result in the determination of questions which are involved in the state court litigation.

126 F.2d at 395.

The *Purcell* decision was based on *Watson v. Jones,* 13 Wall. 679 (1872) where this Court held that if there is *any* relief a federal court can grant which will not disturb the jurisdiction of a related state court proceeding, the court has a right to hear the case and grant that relief. *Id.* at 720.

Another compelling example of a mixed in personam and in rem action and cited by Petitioner was *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Company,* 600 F.2d 671 (7th Cir. 1979). Although the court recognized the split nature of the relief sought, it did not believe that this was sufficient to defeat federal jurisdiction. *Id.* at 675.

Similarly, the split nature of the relief sought by Allmon, in the action assisted by petitioner Moody, does not justify the over-reaching injunction issued by the Alabama Circuit Court. Only a purely in rem action could be enjoined; any other suit should be left to the discretion of the district court judge to grant appropriate relief not inconsistent with the existing state court in rem proceeding. Because the state court injunction was overly broad, the contempt judgment and related civil judgment on appeal to this court must be overturned.[3]

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[3]It also appears that the Final Judgment issued by the U.S. District Court, Southern District of Texas, Galveston Division against petitioner on November 14, 1978 (Pet. App. 12a) is invalid also because it conflicts with valid Texas law that expressly gives petitioner and other stockholders of Empire Life Insurance Company the right to sue the State of Texas. *Amicus* App. 1a.

II.

THE STATE COURT INJUNCTION PROHIBITING PETITIONER FROM FILING OR AIDING ANY ACTION IN ANY COURT BROUGHT AGAINST THE RECEIVER VIOLATES THE CONSTITUTIONAL RIGHTS OF PETITIONER AND OTHER PARTIES TO THE LITIGATION.

Article III of the United States Constitution and various federal statutes guarantee citizens of the United States access to the federal courts.[4] The Framers recognized that citizens must be allowed to resort to the neutral forum of a federal court in certain cases. For this reason, it has been consistently held that states could not, under the guise of prescribing the modes of redress in their courts or regulating the distribution of their judicial power, enact legislation impairing access to the federal courts. *Marshall v. Baltimore & O. R. Co. v. Henderson,* 57 U.S. 314 (1854); *Hyde v. Stone,* 61 U.S. 170 (1858); *Hayes v. Pratt,* 147 U.S. 557 (1893); *Blacker v. Thatcher,* 145 F.2d 255 (9th Cir. 1944), *cert. denied,* 324 U.S. 848 (1945). A judicial decree of a state court does not differ in any material respect from a statute enacted by a state legislature, and thus cannot impair access to the federal courts.

Amicus submits that the Alabama Circuit Court was totally unjustified as a matter of law and policy in issuing the broadly worded injunction prohibiting the

> filing, financing, sponsoring, initiating or aiding in whole or in part, *in any way* the filing of any lawsuit, complaint, or legal claim, or any amendment to any complaint or legal claim in any court . . . on behalf of any party

relating to the receivership without the court's permission. Petitioner's Brief at 4-5 (emphasis added). This

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[4] 28 U.S.C. §1251.

injunction sweeps too broad, is vague, and violative of petitioner's and others' constitutional rights of speech and association, not to mention their property rights under the Fifth and Fourteenth Amendments.

This court has held that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. Michigan Bar,* 401 U.S. 576, 585 (1971). See also *Bates v. State Bar of Arizona,* 433 U.S. 350, 376 n.32 (1977). While recognizing that state courts and legislatures may act to protect legitimate interests, such as the state court's jurisdiction over a company in receivership, such court orders and laws may never impair the freedoms of speech and association protected by the first amendment. *In Re Primus,* 436 U.S. 412, 426 (1977); *Buckley v. Valeo,* 424 U.S. 1 (1976).

Statutes regulating first amendment freedoms must be narrowly drawn to prevent only that evil which it is within the power of the state to control. *Sheldon v. Tucker,* 364 U.S. 479 (1960); *Elfbrant v. Russell,* 384 U.S. 11 (1966). There can be no doubt that this central principle of constitutional law applies equally to court orders. Nor can there be any doubt that the sweeping and vague injunction issued by the Alabama Circuit Court violates the first amendment rights of petitioner and other parties to the litigation. It also denies him and others of important rights to protect their property interests.

The Alabama injunction not only prohibits petitioner from filing any lawsuit against the receiver without permission, it even prevents him from "aiding in whole or in part, in any way the filing of any (such) lawsuit." This

language not only prohibits petitioner from filing such a suit himself, it even prohibits him from exercising his elementary first amendment right to discuss the issue with a party such as Allmon who has filed such a suit. Nor would petitioner be permitted to bring an in personam lawsuit against the receiver even though it did not infringe on the jurisdiction of the state court, a right clearly guaranteed by *Donovan.*

The first amendment rights of Willie Allmon and other parties who are not even subject to the decree are also infringed. Because the injunction prohibits petitioner from "aiding in any way" the filing of a suit against the receiver, Allmon or others would be unable to communicate with petitioner about any lawsuit they might file. Given the importance of petitioner to any lawsuit involving Empire, this ban effectively nullifies Allmon's first amendment right to prosecute such a suit or receive financial support.

The Washington Legal Foundation believes that the injunction issued by the Alabama state court, which purports to be necessary for the protection of the court's jurisdiction over the Empire Life Insurance Company is contrary to the public interest and should not be allowed to stand. In order that this case not be allowed to establish a damaging and dangerous precedent,[5] WLF urges this court to grant a writ of certiorari and overturn the decision of the Fifth Circuit Court of Appeals.

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[5]This action was brought under 42 U.S.C. §1983. Unless the decision of the Fifth Circuit is reversed, future parties alleging injury by violations of the civil rights laws in the more traditional contexts may be unable to successfully vindicate their rights in federal courts.

CONCLUSION

State courts are not permitted to issue injunctions prohibiting parties subject to their jurisdiction from bringing an action in federal court which is in personam, even though it might interfere with or relates to the *res* under the enjoining court's jurisdiction. Any injunction must be narrowly drawn and directed toward exclusive in rem actions which would seek to wrest jurisdiction or control over the *res* from the enjoining court. And in no case may such an injunction, even if permitted, impair the rights of freedom of speech and the guarantee of access to the federal courts which are protected by the constitution. For all of the these reasons, amicus believes that the Alabama state court injunction and the decision of the Fifth Circuit upholding that injunction are contrary to the public interest and should be declared unconstitutional. We urge the Supreme Court to grant cerriorari in this case to review these important questions and

reaffirm the constitutionally protected rights which have been called into question by the decision of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

H.C.R. No. 118

HOUSE CONCURRENT RESOLUTION

WHEREAS, W. L. Moody & Company, Bankers, Unincorporated, and certain stockholders of the Empire Life Insurance Company of America allege that they have been unlawfully deprived of substantial property interests; and

WHEREAS, W. L. Moody & Company, Bankers, Unincorporated, and certain stockholders of the Empire Life Insurance Company of America allege that the deprivation of their interests was caused by the wrongful acts of certain agents, employees, and elected officials of the State of Texas during the course of receivership proceedings; now, therefore, be it

RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, That W. L. Moody & Company, Bankers, Unincorporated, and any stockholder or group of stockholders of the Empire Life Insurance Company of America be and are hereby granted permission to sue the State of Texas for the relief to which they may be entitled concerning their claim; and, be it further

RESOLVED, That in the event suit is filed, service of citation and other required process be made on the Attorney General of the State of Texas and that the suit be tried as other civil suits; and, be it further

RESOLVED, That nothing in this resolution may be construed as an admission by the State of Texas, or by any of its employees, agents, departments, agencies, or political subdivisions, of liability or of the truth of any allegation asserted by the claimants, but the alleged cause

of action must be proved under the laws of this state as in other civil suits; and, be it further

RESOLVED, That nothing in this resolution may be construed as a waiver of any defense, of law or fact, available to the State of Texas or to any of its employees, agents, departments, agencies, or political subdivisions, but every defense is specifically reserved.

/s/ _____ /s/ _____
President of the Senate Speaker of the House

I hereby certify that H.C.R. No. 118 was adopted by the House on May 27, 1975, by a non-record vote.

/s/ _____
Chief Clerk of the House

I hereby certify that H.C.R. No. 118 was adopted by the Senate on May 29, 1975.

/s/ _____
Secretary of the Senate

APPROVED: June 19, 1975

/s/ _____
Governor

[Filed in the Office of the Secretary of State, 6:30 PM o'clock – JUN 19 1975

/s/ _____
Secretary of State]